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# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
*Defendant-Appellant,*

vs.

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
*Plaintiff-Appellee.*

## STATEMENT RULE XIII, PAR. 4

The above caption shows the proper style of the Court and title of this cause, the correct names of the original parties, and there has been no change in the parties. The dates of filing of the pleadings and other papers in the action with the Court Clerk are as follows:

Apr. 17, 1930—Petition under War Risk Insurance Act.

Aug. 6, 1930—Answer of sole defendant.

May 9, 1932—Case tried, Judge Frederick H. Bryant.

May 10, 1932—Trial continued.

Jan. 13, 1933 — Memorandum opinion of District Judge Bryant.

Mar. 9, 1933—Order extending term.

May 23, 1933—Findings of fact, conclusions of law, judgment.

*Statement rule XIII, Par. 4*

May 27, 1933—Marked defendant's requests to find.
June 3, 1933—Defendant's exceptions to Court's findings and refusals to find.

June 21, 1933—Plaintiff's exceptions to defendant's proposed findings.
Aug. 21, 1933—Defendant's petition for appeal, assignment of errors, order allowing appeal, notice of appeal and citation.
Sept. 20, 1933—Affidavit and order extending time to file and docket case.

The case was tried at a term of the District Court in Syracuse, May 9th and 10th, 1932, Hon. Frederick H. Bryant presiding, before a jury. Defendant's motions for dismissal and non-suit at close of plaintiff's evidence and at close of the case were denied. Both parties moved for a directed verdict in their favor and the Court dismissed the jury and reserved decision by the Court. Formal findings were made and judgment for the plaintiff for $5,000 entered May 23, 1933. Appeal by defendant was taken August 21, 1933.

The District Court, Northern Judicial District of New York, had jurisdiction of this action as provided in Sec. 445, Title 38, U. S. C. A., and by the same section the Circuit Court of Appeals, Second Circuit, has appellate jurisdiction herein.

## PETITION

## IN THE UNITED STATES DISTRICT COURT

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

against

THE UNITED STATES OF AMERICA,

*Defendant.*

The plaintiff, complaining of the defendant in the above-entitled action, and for a cause of action, alleges and shows to the Court:

First

That, heretofore and prior to the commencement of this action, the said James Patrick Mahar resided in the City of Oneonta, Otsego County, New York.

Second

That, on or about June 25th, 1917, at Albany, N. Y., the said James Patrick Mahar enlisted for military service in the United States Army; that, thereafter and on or about April 3rd, 1919, the said James Patrick Mahar was duly granted an honorable discharge from the United States Army, as a sergeant, first class, of Engineers; that, between June 26th, 1917, and April 3rd, 1919, the said James Patrick Mahar served as an enlisted soldier, and non-commissioned officer, and participated in the following battles, engagements, skirmishes and expeditions: Guillemont

Farm, Hindenburg Line, LaSelle River (St. Souplet), Jone De Mere Ridge, St. Maurice River, East Poperinghe Line.

10

Third

That during the said period of his said military service the said decedent, desiring to be insured against the risk of death and total permanent disability, applied for a policy of War Risk Insurance to be issued by the U. S. Government, through its duly constituted bureau, which was duly issued to him; that, the said insurance policy was duly maintained by the said James Patrick Mahar during his period of service in the U. S. Army, and, thereafter, so long as he was able financially to maintain the same and pay the premium thereon. On information and belief, that, thereafter, the said James Patrick Mahar failed to pay the premium thereon, and the said policy was allowed to lapse and the said insurance policy was lapsed for non-payment of premiums.

11

Fourth

Upon information and belief, that, thereafter, and on or before July 1st, 1927, the said James Patrick Mahar duly made application to the United States of America, through the United States Veterans' Bureau, for the reinstatement of a portion of his said insurance; upon information and belief, that, thereafter, and on or about September 19th, 1927, the United States of America issued to the said James Patrick Mahar, Government Life Insurance Policy No. K 812772 in the sum of five thousand dollars ($5,000.00), which became effective on July 1st, 1927; that, in accordance with the terms and pro-

12

visions thereof, the United States of America agreed to pay to the estate of the insured the sum of five thousand dollars ($5,000.00); that, thereupon, the said insured, James Patrick Mahar, agreed to pay to the United States Veterans' Bureau as the monthly premium upon the said insurance policy, the sum of three dollars ninety-five cents ($3.95); or in the alternative, the quarterly premium of eleven dollars eighty cents ($11.80); or in the alternative, the semi-annual premium of twenty-three dollars fifty-five cents ($23.55), or the anual premium of forty-six dollars sixty-five cents ($46.65). 18

Fifth

Upon information and belief, that on or before July 1st, 1927, the said James Patrick Mahar paid to the Treasurer of the United States the sum of thirteen dollars ninety cents ($13.90), and received therefor a receipt duly issued by the United States Government for that amount in full payment of insurance premium due on the said policy from July 1, 1927, to October 1st, 1927; that, thereafter, the said James Patrick Mahar paid all of the premiums upon the said insurance policy as they became due. 14

Sixth

That, thereafter, and during the month of September, 1927, the said James Patrick Mahar became ill and unable to work; on information and belief that the said James Patrick Mahar, during the month of September, 1927, and thereafter during the months of October and November, 1927, became impaired in both body and mind, so that he became and was continuously rendered physically and mentally unable 19

16 to follow any substantial or gainful occupation, including his occupation as car inspector, and continued so disabled both mentally and physically, so as to be unable to earn any money whatever and to follow any gainful occupation; upon information and belief, that the said James Patrick Mahar, during the months of September, October, November and a part of December, 1927, suffered from a progressive growth involving the gall bladder and its ducts of a malignant character which disabled him permanently; upon information and belief that the said James Patrick Mahar, during the months of September, October, November and December, 1927, was
17 totally and permanently disabled within the provisions of paragraph Eleventh of the said insurance policy.

**Seventh**

Upon information and belief, that thereafter and on or about December 24th, 1927, the said James Patrick Mahar died in the City of Oneonta, Otsego County, N. Y., as the result of such growth involving the gall bladder and its ducts and as the result of the causes of such disability. Upon information and belief, that from on or about September 1st, 1927, the
18 said James Patrick Mahar was disabled within the intent and meaning of paragraph Eleventh of the said insurance policy and that such disability continued from on or about that time until the date of the death of the said James Patrick Mahar, which occurred on or about December 24th, 1927.

**Eighth**

That, thereafter, and on or about January 18th, 1928, your plaintiff was duly appointed administrator of the estate of the said James Patrick Mahar by the Surrogate of Otsego County, New York, who, thereupon, duly issued letters of administration to this plaintiff, the Wilber National Bank of Oneonta, N. Y., which said letters of administration are still in full force and effect; that your petitioner, the Wilber National Bank of Oneonta, N. Y., has ever since acted and now is acting as such administrator of the estate of James Patrick Mahar, deceased.

**Ninth**

Upon information and belief, that all of the premiums which became due and payable in accordance with the terms and provisions of the said insurance policy have been paid by or in behalf of the said James Patrick Mahar, now deceased; upon information and belief that the said James Patrick Mahar was permanently and totally disabled during the months of September, October, November and the fore part of December, 1927; and that he became entitled to receive from the defendant under the terms of the said contract of insurance, all of the benefits to be derived therefrom in accordance therewith, including a refund of any and all premiums paid under the said insurance policy.

**Tenth**

That plaintiff, herein, has made due and timely proof of said disability to the defendant and also of the death of the said James Patrick Mahar, deceased.

and has demanded payment of all of the amounts due in accordance with the terms and provisions of the said policy, but that the defendant has disagreed with the plaintiff as to the claim for disability of the said James Patrick Mahar and in behalf of his said estate, and has wholly failed and refused to pay said sum or sums of money due under the said insurance policy, or any part thereof.

Wherefore, plaintiff prays judgment against the defendant in the sum of five thousand one hundred fifteen dollars ($5,115.00), being the amount due the estate of the said decedent at the rate of five thousand dollars ($5,000.00), for the death of the said decedent, and the further installments of twenty-eight dollars seventy-five cents ($28.75), per month from September 1st, 1927, to December 24th, 1927, and with proper legal interest thereon, together with an allowance for the payment of medical and other expenses incidental thereto, the costs incurred herein, together with such attorney's fees as the Court may find reasonable, not to exceed ten per cent of the amount of the judgment, and for such other and further relief as the plaintiff may be entitled to receive, herein, in the premises.

FRANK C. HUNTINGTON,
Attorney for the Plaintiff,
Office and P. O. Address,
Wilber National Bank Bldg.,
Oneonta, New York.

STATE OF NEW YORK,
County of Otsego,
City of Oneonta. } ss.

Edward Crippen, being duly sworn, deposes and says that he is an officer, to wit, the President of the Wilber National Bank of Oneonta, N. Y., the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDW. CRIPPEN.

Sworn to before me this 22nd day of
March, 1930.
JOHN M. HOTALING,
Notary Public,
Otsego County, N. Y.

## ANSWER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

against

THE UNITED STATES OF AMERICA,

*Defendant.*

Law 1389

The defendant, United States of America, by Oliver D. Burden, United States Attorney for the Northern District of New York, for answer to the petition and complaint of The Wilber National Bank of Oneonta, N. Y., as Administrator of the Estate of James Patrick Mahar, Deceased, plaintiff herein, admits, denies, alleges, upon his information and belief, and respectfully shows to the Court, as follows:

1. The defendant denies the allegations of Paragraph numbered First of the said petition and complaint.

2. The defendant admits the allegations of Paragraph numbered Second of the said petition and complaint.

3. The defendant admits the allegations of Paragraph numbered Third, except as to the following, to wit, "and, thereafter, so long as he was able finan-

cially to maintain the same and pay the premium thereon", which allegation is denied.

4. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph numbered Fourth of said petition and complaint, and denies the same.

5. The defendant denies the allegations of Paragraph numbered Fifth of said petition and complaint.

6. The defendant denies all the allegations contained in Paragraph numbered Sixth of said petition and complaint.

7. The defendant is without knowledge or infor- to form a belief as to the allegationsmation sufficient as to the date of the death of said James Patrick Mahar, and denies the allegations contained in Paragraph Seventh of the petition and complaint.

8. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph numbered Eighth, and denies the same.

9. The defendant denies the allegations contained in Paragraph numbered Ninth of said petition and complaint.

10. The defendant admits that disagreements exist between the plaintiff and the defendant as to the defendant's liability under the alleged contract, which is the basis of said suit, and denies the other allegations contained in said Paragraph numbered Tenth of said petition and complaint.

11. The defendant denies that it is indebted to the plaintiff in the sum of $5,115.00 or any other sum, and denies that under the alleged contract and laws

applicable thereto, the defendant is liable for proper
34 legal interest thereon, or any part thereof, and is liable for an allowance for the payment of medical and other expenses incidental thereto, and is liable for costs of said action, or the allowance of attorney's fees therein.

Wherefore, the defendant demands that said petition and complaint be dismissed with costs as against the plaintiff.

UNITED STATES OF AMERICA, Defendant,
By OLIVER D. BURDEN,
United States Attorney for the
Northern District of New York.

35

NORTHERN DISTRICT OF NEW YORK,
State of New York,
County of Onondaga. } ss.

Oliver D. Burden, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters stated to be alleged upon information and belief and as to those matters he believes it to be true.

That the reason this affidavit is made by deponent
36 and not by the plaintiff is that the plaintiff is a corporation sovereign and acts through its officers and agents, and that deponent is such officer, to wit, the United States Attorney in and for the Northern District of New York. That the sources of deponent's knowledge and the grounds of his belief as to matters alleged upon information and belief are communi-

cations of the proper officers and agents of the Government in the hands of deponent.

OLIVER D. BURDEN,
United States Attorney.

Sworn to before me this 31st day of July, 1930.

B. F. TOMPKINS,
Notary Public.

## BILL OF EXCEPTIONS

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff*,

against

THE UNITED STATES OF AMERICA,

*Defendant*.

Law No. 1389

Minutes of proceedings at a Special Term of the Court at Syracuse, N. Y., May 9th, 1932.

Presiding: Hon. Frederick H. Bryant, U. S. District Judge.

APPEARANCES:

Frank C. Huntington, Attorney and Counsellor at Law, Oneonta, New York, Attorney, and George L. Bockes, Esquire, Attorney and

Counsellor at Law, Oneonta, New York, of counsel, for the plaintiff;

40 Honorable Oliver D. Burden, United States Attorney in and for the Northern District of New York, Federal Building, Syracuse, New York, by Joseph San, Esquire, Insurance Attorney, and William A. Gillchrist, Esquire, Assistant Insurance Attorney, Washington, D. C., and B. Fitch Tompkins, Esquire, and Henry R. Follett, Esquire, Assistant United States Attorneys, Northern District of New York, of counsel, for the Government, defendant.

A jury was called, examined and sworn. Attorney
41 Frank C. Huntington made the opening statement for the plaintiff and B. Fitch Tompkins, Assistant U. S. Attorney, made the statement for the defendant.

Mr. Tompkins: We have a witness here, a doctor and a very busy man, who made an examination and certified at the time this policy was converted.

He does not remember much about it, except the written examination, and the plaintiff's attorneys are willing to consent that that examination be read with the same force and effect as though the doctor was here, took the stand and testified to it.

42 In view of that I want to let the doctor go home and with the consent of the plaintiff's counsel and with that understanding, I want to discharge the witness at this time.

The Court: Is that satisfactory to you?

Mr. Bockes: Yes, sir; it is, your Honor.

The Court: Very well, you may discharge your

witness, Mr. Tompkins.

Mr. Bockes: I will now call Mrs. Johnson.

The Court: The witness will come forward and be sworn.

Mr. Bockes: Just a minute, please.

(Conference between counsel.)

Mr. Tompkins: If your Honor please:

Now plaintiff's counsel would like to have us swear the doctor out of the order, and then he will stipulate the paper.

He wants to ask one question or so. I understood he was willing to take the paper without the witness being called.

The Court: I will let you, if you prefer, take one of the defendant's witnesses out of order at this time, if you prefer to do that, and if you consent to it.

Mr. Bockes: It is just one question and the witness can be sworn and then disposed of.

The Court: Very well, call your witness.

Mr. Tompkins: Doctor Augustine.

---

GEORGE W. AUGUSTINE, called as a witness on behalf of the defendant, out of order, and being duly sworn, testified as follows:

*Cross examination* by Mr. Bockes:

Q. Doctor, are you a resident of the City of Oneonta? A. I beg your pardon?

Q. Do you live in the City of Oneonta? A. Yes, sir.

Q. And you have been a resident of the City of

Oneonta for how long? A. Twenty years, about.

46 Q. And how long have you been a practicing physician and surgeon? A. Thirty-three years.

Q. I show you the record of the death of James P. Mahar and I will let you pronounce the names of the causes of death; what are they as stated in that record? A. Chronic inflammation of the gall bladder and its ducts and pulmonary embolism.

Q. Now, with respect to the first two: In your opinion, would they imply some weeks of sickness before the hospitalization and death? A. They might and probably they did.

Mr. Bockes: That is all.

47 The Court: Now, that, as I understand it, is to be taken in addition to his testimony which will be read later?

Mr. Bockes: Yes, sir.

Mr. Tompkins: But we will reserve that, the witness's examination of the decedent until later.

Mr. Bockes: Yes.

*Direct examination* by Mr. Tompkins:

Q. Doctor, was the condition of the gall bladder as it is reported in this death certificate, a disease which could be in any sense termed a total or permanent disability? A. Yes; a total disability at times,

48 of course.

Q. But, in the sense of permanent, what do you say? A. I do not think anyone could give you any opinion on that.

Q. In other words, such a condition is terminable, or capable of being treated by operation, or otherwise arrested? A. Yes, sir; it is.

Q. And usually successfully? A. Yes, sir.

Q. And the other condition given for death, as set forth in there, was what, in common language, Doctor? A. Well, I should call it an accidental surgical death caused by some foreign material, probably a clot, entering the blood stream and lodging at some vital or fatal area, such as the lung or the brain.

Q. Was it a condition in and of itself, or one that was brought about by reason of the operation? A. Undoubtedly brought about by reason of the operation.

Q. And is such a condition often the result of anaesthesia or the operation connected with a condition of that kind? A. Not uncommon.

Q. What? A. It is not uncommon.

Q. You personally did not attend this deceased? A. No, sir; I did not.

Q. And a part at least of your examination which was made in July of this Mr. Mahar, was set forth in the written examination made by you? A. Yes, sir.

Q. And you found him in good health? A. In good health.

Q. And insurable? A. And insurable; yes, sir.

Mr. Tompkins: That is all.

*Recross examination* by Mr. Bockes:

Q. Now, at that time you stated in your report there that you considered him a first-class risk; did you not? A. Yes, sir; I did.

Q. And did you see anything to excite any sus-

picion that he was not a first-class risk? A. Well,
52 I know that he was so far as I could tell by an examination such as I am accustomed to make.

Q. That he was at that time? A. Yes, sir.

Q. Did you give him the ordinary examination that you ordinarily and usually do to applicants for life insurance? A. Yes, sir.

Q. Now, Doctor, I think you told me that for a few weeks previous to his death he might have been disabled by this disease mentioned in the death certificate? A. He may have been and very probably was.

Q. And so would it be in your opinion entirely
53 possible that he was disabled from, say, the middle of September, to the time of his death on December twenty-fourth?

Mr. Tompkins: I object to that as speculative and incompetent, immaterial and irrelevant.

The Court: Overruled. I will let him answer if he can answer it.

Mr. Tompkins: An exception.

By Mr. Bockes:

Q. The Court says you may answer? A. What is the question?

Q. The stenographer will read it to you.

54 (The stenographer repeated the question as follows:

"Question: And so would it be in your opinion entirely possible that he was disabled from, say, the middle of September, to the time of his death on December twenty-fourth"?)

A. Yes, sir; possible.

---

Mr. Bockes: That is all.

The Court: But you do not know anything about his condition? 55

The Witness: Not the first thing.

*Redirect examination* by Mr. Tompkins:

Q. You mean by "disabled" that the patient was probably sick? A. Pardon me?

Q. You mean by "disabled" that the patient was probably sick? A. Oh, he must have been; yes, sir.

---

HELEN MAHAR JOHNSON, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows: 56

*Direct examination* by Mr. Bockes:

Q. Where do you reside, Mrs. Johnson? A. Gilboa.

Q. Where did you reside at the time of the death of James P. Mahar? A. Four East End Avenue, Oneonta.

Q. Was he your husband? A. Yes.

Q. When did he die? A. December the twenty-fourth, 1927.

Q. Leaving you as his widow and some children? A. Yes, sir. 57

Q. How many children? A. Three.

Q. What were their ages at the time of his death, or about their ages at the time of his death? A. Mary was born the fourth of August, 1920; Lillian was born the eighteenth of June, 1922, and James

was born the twenty-second of May, 1927.

58 Q. And after the birth of the last child did he do something about increasing his life insurance? A. He reinstated this government life insurance.

Q. I will show you a paper and I ask you if that is the policy which he received? A. Yes, sir; it is.

Mr. Bockes: That I offer in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Insurance policy received in evidence and marked Plaintiff's Exhibit Number 1, of this date.)

By Mr. Bockes:

59 Q. Did you also find among his papers a paid check to the Treasurer of the United States? A. Yes, sir; I did.

Q. For thirteen dollars and ninety cents? A. Yes, sir.

The Court: For how much?

The Witness: Thirteen dollars ninety cents.

Mr. Bockes: And that I offer in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Paid check to Treasurer of the United States for $13.90, received in evidence and marked Plaintiff's Exhibit Number 2, of this

60 date.)

By Mr. Bockes:

Q. I show you another paper, marked "provisional receipt", and I ask you if that arrived soon after he sent the check? A. Yes, sir; it did.

Mr. Bockes: I offer that in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Provisional receipt received in evidence and marked Plaintiff's Exhibit Number 3, of this date.) 61

The Court: What is the date of it?

Mr. Bockes: This says payment received July 29, 1927.

By Mr. Bockes:

Q. I show you a postoffice money order and I ask you if that is connected with this insurance in any way? A. Yes; that was the premium for November.

Mr. Tompkins: What did the witness say it was for? 62

Mr. Bockes: She said it was for the premium for the month of November, and I offer it in evidence.

Mr. Tompkins: I object to it and ask that it be stricken out; that is not a fair statement.

The Court: Yes; the answer may go out, that it is a payment for November.

Mr. Tompkins: I suggest you see what she knows about it first.

Mr. Bockes: Very well.

By Mr. Bockes:

Q. I will ask you, Mrs. Johnson, just what you know about this paper that I just showed you, this post-office money order receipt? A. That was the amount of money that was to be sent to the government. 63

Mr. Tompkins: I object to that and ask that it go out.

The Court: That may go out.

64 By Mr. Bockes:

Q. Who sent it in to the government; you or your husband? A. I sent it in.

Q. You did, yourself? A. Yes, sir.

Q. And to whom did you send it? A. To the treasurer of the United States.

Q. To the treasurer of the United States? A. Yes, sir.

Q. Any letter or letters go along with it? A. No, sir.

Mr. Bockes: I offer that in evidence.

Mr. Tompkins: I object to it as not properly identified and not enough to show itself what it is;

65 it is just a stub for a money order.

The Court: Let me see it, if you will?

(Same handed to and examined by the Court.)

The Court: Objection sustained.

I think you better examine her further on that; get more details about it.

Mr. Bockes: An exception.

By Mr. Bockes:

Q. What, if anything, did you send along with your post-office money order to the treasurer of the United States? A. What is it?

Q. The stenographer will repeat the question.

66 (The stenographer repeated the question as follows:

"Question: What, if anything, did you send along with your post-office money order?")

A. We generally had these notices.

Q. No; on this particular occasion of November second, 1927? A. I don't remember whether we

received one for this or not.

Q. How did you send it; in an envelope? A. Yes, sir. 67

Q. And what else was there in the envelope besides your postoffice money order, if anything? A. Nothing; I don't think there was a thing in it, only the money order.

Q. Had you received any statement from the government of premium due or anything of that sort that you attached to it? A. I don't remember whether we did or not, but I knew that these monthly payments were due and that is the reason I sent it.

Mr. Tompkins: I move to strike that out.

The Court: That may go out. 68

Mr. Tompkins: As a conclusion.

The Court: It may go out.

By Mr. Bockes:

Q. Well, later on did you send in to the Treasurer of the United States another postoffice money order for three dollars and ninety-five cents? A. Yes, sir; I did.

Q. And when was that? A. In December, 1927.

Q. In the meantime had the first postoffice money order come back to you? A. No, sir.

Q. What happened to the second postoffice money order? A. It was put in the envelope and 69 sent to the Treasurer of the United States.

Q. And did the proceeds of that, or the postoffice money order, ever come back to you? A. No, sir; it did not.

Q. Was your name written on the envelope, or Mr. Mahar's name? A. Mr. Mahar's name was

written on the outside of the envelope.

70 Q. In both cases? A. Yes, sir.

Q. Give his street number and address? A. Four East End Avenue; yes, sir.

Q. Four East End Avenue, Oneonta? A. Yes, sir.

Q. How was his name written? A. James P. Mahar.

Q. James P. Mahar? A. Yes, sir.

Q. Just as it was written on this policy? A. Yes, sir.

Q. And I believe you said that this second payment of three dollars and ninety-five cents, or the December payment of three dollars and ninety-five

71 cents was never returned to you in any way? A. No, sir; it was not returned.

Mr. Bockes: Now, I renew my offer to put the postoffice money order receipt in evidence in view of the testimony that James P. Mahar's name was written on the corner or outside of the envelope.

The Court: You went to get these two orders you testified about?

The Witness: Yes, sir.

The Court: And when you received them did you receive any receipts from the postmaster?

72 The Witness: These two money orders?

The Court: Yes.

The Witness: Just the stub.

The Court: Just the stubs?

The Witness: Just the stubs; yes, sir.

The Court: And these are the stubs you got at that time?

The Witness: Yes, sir.

Mr. Tompkins: I object to it as incompetent and immaterial.

73

The Court: Where is there any materiality in it? That is no proof. She testifies that she sent them; this does not add to that in any way, does it, any more than possibly to fix the dates. I do not assume there will be any dispute that these orders were made by her and mailed as she has testified here.

I will sustain the objection at this time and if it becomes material a little later in the case I will allow you to renew your offer.

For the present, objection sustained.

Mr. Bockes: I find here now a letter from George E. Agan, assistant director, with reference to these payments, and so I will waive this proof by her.

74

Now, while we are at it, I will offer that in evidence right now, a letter from the United States Veterans Bureau, dated March twenty-first, 1928, to Frank C. Huntington.

(Same shown to and examined by Mr. Tompkins.)

Mr. Tompkins: Well, I object to the offer; the letter now offered is a letter addressed to Mr. Huntington and not to the witness.

Mr. Bockes: This is relative to the payment of the premiums.

75

The Court: May I look at that?

Mr. Bockes: Yes, sir.

(Same shown to and examined by the Court.)

The Court: I do not believe we ought to put all of this letter in evidence.

As I understand, the purpose of it is to show, it

is really to corroborate this witness in her testi-
76 mony that a payment of three dollars and ninety-
five cents was made in November and a payment of
three dollars and ninety-five cents sent in Decem-
ber; that is the purpose of it?

Mr. Bockes: That is the purpose of it, your Honor.

The Court: Well, I presume from this letter and the testimony of this witness that there will be no dispute on that. Am I correct in that?

Mr. Tompkins: I do not know about that. I cannot quite agree with your Honor. I think that letter there was written by an official who did not
77 receive it and I think he is passing on the claims that Mr. Huntington made about their being payments of premiums and so forth.

The Court: I will sustain the objection at this time. I say it is possible that I will reverse my ruling as the case develops a little further.

Mr. Bockes: Nearly three weeks ago, or over two weeks ago, anyway, Mr. Huntington served on government counsels a demand to produce books showing the receipt by the government of all sums of money paid by James Patrick Mahar as premiums or otherwise upon this policy, and if they have complied with that request, they should have said so,
78 and they should have produced the records.

Mr. Tompkins: If your Honor please: I have the files here, but I do not know where to put my hands on that record, if it is in the files here, and Mr. San, who expects to be here on the trial, probably can do it, and he had notice of this demand and I think he can do it.

Now, while we are willing to produce all we have got, I do not like to be put in the position of having that letter reviewing the claim made by Mr. Huntington received in this way; I do not believe the government ought to be bound by that recital and especially in the form in which it was made there. 79

The Court: Well, this witness has already testified positively to these payments. Now, if I were to allow you later in the case, if they are attacked in any way, to renew your offers to corroborate, won't that cover your purpose at that time?

Mr. Bockes: Yes; it will, very well, your Honor.

The Court: Very well. Proceed.

By Mr. Bockes:

Q. Is this paper which I now show you, the soldier's discharge of James P. Mahar? A. Yes, sir; it is. 80

Mr. Bockes: I offer it in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Soldier's discharge of James P. Mahar received in evidence and marked Plaintiff's Exhibit Number 4.)

By Mr. Bockes:

Q. Now, how was mail delivered at your house, Mrs. Johnson, by the regular mail carrier? A. By the regular mail carrier; yes, sir. 81

Q. And who got the mail; you or somebody else in the family? A. I got it.

Q. Always? A. Yes, sir.

Q. Now, from the time that the policy was received, were there any communications came to your

82 house, to your knowledge, concerning this insurance until along after his death? A. No, sir; there were not.

Q. And I show you a communication and I ask you if that is the first one ever received at your house through the mails or otherwise after the policy arrived? A. Yes; that came in January.

Q. 1928? A. 1928.

Mr. Bockes: I offer it in evidence.

Mr. Tompkins: No objection.

The Court: Received.

(Communication received by Mahar in January, 1928, received in evidence and
83 marked Plaintiff's Exhibit No. 5, of this date—consisting of two sheets.)

By Mr. Bockes:

Q. And when was the next communication received at your house relative to this policy? A. Just about the first of March.

Q. 1928? A. 1928.

Q. And is this the communication? A. It is.

Mr. Bockes: I offer this communication in evidence.

Mr. Tompkins: I object to it as immaterial and it appears to be in March, 1928, after this whole af-
84 fair had terminated and it seems to me to be immaterial.

The Court: May I see it?

Mr. Bockes: Yes, sir.

(Same shown to and examined by the Court.)

Mr. Tompkins: Mr. Mahar died in December, 1927, and this is something along in March, 1928.

Mr. Bockes: It bears upon the question of whether the government by accepting premiums in November and December and sending a statement in January and again in March and April, did not create such a state of facts whereby they kept this policy alive independent of any question of lapse. 85

The Court: Now, may I see the exhibit that you introduced just before this.

Mr. Bockes: Yes, your Honor.

(Same shown to and examined by the Court.)

Mr. Bockes: I am not offering this upon the theory that the government has estopped itself as a matter of law from interposing its defense; not at all upon that theory; but upon the question of whether there is not a question of fact created here by the acts of the government in taking the November payment and the December payment and in sending notices in January and March and April that kept this policy alive as a question of fact. 86

The Court: I am going to sustain the objection to the offer of the letter that was received in March.

Mr. Bockes: And an exception, please.

By Mr. Bockes:

Q. And is this a record of your husband's death certificate? A. Yes, sir; it is.

Mr. Bockes: I offer that in evidence.

Mr. Tompkins: No objection. 87

The Court: Received.

(Death certificate received in evidence and marked Plaintiff's Exhibit Number 6, of this date.)

By Mr. Bockes:

Q. After your husband's death, did you have the

88 Wilber National Bank of Oneonta, New York, appointed as administrator? A. Yes, sir.

Q. And they are still acting as such? A. Yes, sir.

Q. Now, going back to an earlier time: When did you marry Mr. Mahar? A. September fifth, 1919.

Q. And what was his condition of health at that time? A. Very good.

Q. How long did it continue good? A. It continued until in September, 1927.

Q. And what did you observe about his change in condition of health in September, 1927? A. Well, 89 his yellow color and he neglected his work around the house.

Q. What kind of work did he neglect? A. Emptying ashes and carrying coal and attending to his garden.

Q. And what, if anything, about financial affairs? A. Why, he left those and I had them to attend to myself then.

Q. Up to that time had he always taken care of them? A. Yes; he had.

Q. Did he have other insurance? A. Yes, sir.

Q. What did he do about that, the payment of 90 premiums on that? A. I attended to that, the railroad insurance——

Mr. Tompkins (Interrupting): What period is this if I may inquire.

The Court: In September, 1927, as I understand it.

Mr. Bockes: Yes.

By Mr. Bockes:

91 Q. Can you fix the time more definitely in September when this occurred? A. About the middle of September.

Q. Up to that time had he taken care of all financial affairs? A. Yes, sir; he had.

Q. And after the middle of September did he take care of any? A. No, sir.

Q. What about the payment of bills to storekeepers and so on? A. I had to do that myself.

Q. And continuously after the middle of September? A. Yes, sir.

Q. Had you done any of that before the middle of September? A. No, sir.

92 Q. What facts or events led up to your sending in three dollars and ninety-five cents to the treasurer of the United States on November second, 1927? A. I talked with him about it and he said to send it in.

Q. What, if anything, was said about it; what it was for and so on? A. Well, just that it was the premium that was due on that insurance.

Q. And anything said about anything being back on it at that time? A. No, sir.

Q. Did you know that there had been any duns or any claims that back premiums were due and payable? A. No; there had not been. 93

Q. Were they paid up so far as you knew? A. As far as I knew, they were.

Q. And had there been any communications of any kind, to your knowledge, relating to this insurance, after the receipt for the thirteen dollars and ninety cents and the receipt of the insurance

policy? A. There had not been any that I knew of.

94 Q. Now, counsel suggests that you give more details of what you observed about his actions after the middle of September, or lack or actions, different from his conduct theretofore? A. Well, before he had always done the chores around the house and carried the coal and his ashes and everything like that, and attended to his garden.

Q. Did he do any work whatsoever after the middle of September around the house? A. No, sir.

Q. Either physical or mental? A. No, sir.

Q. And you have already said that his eyes looked yellow? A. Yes, sir; he had a yellow color.

95 Q. And what else did you notice about his physical condition? A. He lost weight and he would sit around the house and he wouldn't do things he had done before.

Q. Had you had a family physician for a number of years? A. Yes, sir; Doctor Winsor.

Q. Did he have some talk with Doctor Winsor in September? A. Yes, sir; he saw him on the street in Oneonta.

Q. About what time in September was that? A. About the middle of September.

Q. What complaints did your husband make
96 about his health after the first of September?

Mr. Tompkins: To her?

Mr. Bockes: What is it?

Mr. Tompkins: You mean complaints made to her?

Mr. Bockes: Well, yes, complaints made to her; yes.

By Mr. Bockes:

Q. Do you remember anything he said about his health? A. Why, he didn't feel good and he told the doctor if his health did not improve he was coming up to see him. 97

Q. Did you make any efforts to get him to go to the doctor? A. Yes, sir; I tried to get him to go to the doctor in September.

Q. And when did he finally actually interview the doctor for examination, as you understand it? A. October the seventeenth.

Q. And that was about the time he quit work? A. Yes, sir.

The Court: September? 98

The Witness: Of October.

The Court: October?

The Witness: Yes, sir.

By Mr. Bockes:

Q. Now, for the purpose of refreshing your recollection I will ask you whether he did not say that he thought it was simply jaundice and he could shake it off, or words to that effect? A. Yes, sir; he did.

Q. From that time on just tell what happened to him with respect to his seeing doctors and whether his health got better or worse, or continued the same? You do not need to have me ask you questions about everything. You just go ahead and give a little history to the jury of what happened to your husband from the middle of September on with reference to his health? A. He kept going down hill all the while until October and then he went to the doctor and he did not work any after that. 99

Q. Did he get any better after that? A. No,

sir; he kept getting worse all the while.

100 Q. Did he do any work of any kind? A. No, sir.

Q. Did he do any work of any kind that you saw after the middle of September; that you saw? A. No, sir; he did not.

Q. Now, who worked with him at his shop, or whatever it was? A. Mr. Melius and Mr. Hitchcock.

Q. Was there somebody who was a near-neighbor who drove back and forth with him to work? A. Mr. Hitchcock.

Q. Mr. Hitchcock? A. Yes, sir.

101 Q. What was your husband's work? A. Car inspector.

Q. For the Delaware and Hudson Company? A. Yes, sir.

Q. And how long had he been engaged in that work? A. He worked as car inspector about four years.

Q. And who was his foreman on that job? A. Mr. Melius.

Q. And he is here in court? A. Yes, sir.

Q. And how often did he see the doctor after this time in October you speak of? A. He saw him every week at least.

102 Q. And then finally in the early part of December they took him to the hospital? A. Yes, sir.

Q. Before that was there some council or conference between doctors? A. There was Doctor Brinkman of Oneonta.

Q. He consulted with Doctor Winsor? A. Yes; he consulted with Doctor Winsor.

Q. Over your husband's health? A. Yes, sir.

Q. Until he stopped working with the Delaware and Hudson Company, what were your husband's hours of work? A. From three to eleven. 103

Q. And until the eighth of September, what was his work for the D. and H.? A. Car inspector.

Q. What was it after that and up until he quit work? A. Well, they transferred him down to the hump where he just had to mark the cars, instead of working on them, making the repairs on them.

Q. And when did the doctors finally take him to the hospital? Was it in the early part of December? A. Yes, sir; I do not remember the exact date.

Q. And after a few days they operated on him and he died? A. Yes, sir. 104

Q. Now, what did you do about presenting a claim after his death for the amount of the insurance and for compensation for the time he was disabled? A. Well, that policy was turned over to Mr. Huntington and he sent in for the application, or for the forms, whatever it was that was necessary to do.

Q. And no part of this insurance or compensation has ever been received? A. No, sir.

Mr. Bockes: I think that is all.

*Cross examination* by Mr. Tompkins:

Q. The insurance under this policy is not to be received by you; is it, Mrs. Johnson? A. No, sir. 105

Q. Now, the policy is payable to his estate; is it not? A. Yes, sir.

Q. And so you would not receive it; you are not the administrator, are you? A. No, sir.

Q. When did you first see this policy, Exhibit 1,

if you can recall? A. When he brought it home after
106 he received it in September, 1927.

Q. In September? A. Yes, sir.

Q. Do you remember what day in September it was? A. I think it was September the seventeenth.

Q. Did you look at plaintiff's Exhibit 1; did you examine the policy? A. Yes, sir.

Q. Did you notice it called for a payment of three dollars and ninety-five cents the first day of each month? A. Yes, sir.

Q. You had never sent in any premium, that sum of three dollars and ninety-five cents, the first of July; had you? You never sent it in; did you? A.
107 No, sir; he sent that himself.

Q. He did? A. Yes, sir; he sent the check and that covered it.

Q. The thirteen dollar and ninety cent check? A. Yes, sir.

Q. But that was given at the time this policy was issued? A. Yes, sir.

Q. To clear it up and get this new policy? A. Well, I supposed so; yes.

Q. This is not the policy he originally had? A. No, sir.

Q. This is a new one dated the first day of July,
108 1927? A. Yes, sir.

Q. And this thirteen dollars and ninety cents, the check, was sent on application for this particular policy; was it not? A. Yes, sir; it was.

Q. And so far as you know and until at least the second of November, this three dollars and ninety-five cents monthly premium had not been paid since

the policy issued; was it? A. I supposed it had been paid.

Q. Well, so far as you knew, it had not been paid? A. So far as I knew it had been paid.

Q. So far as you supposed? A. Yes, sir.

Q. You did not know anything about it then? A. No, sir; I did not; not at that time.

Q. Now, how did you come to send in the three dollars and ninety-five cents in November? A. I talked it over with Mr. Mahar and he said that was the amount that was due and for me to send it in.

Q. Was the first day of November mentioned or anything of that kind, that you recall? A. I do not remember that.

Q. Do you know why you sent it on the second day of November rather than the first day of November? A. No, sir.

Q. What kind of an envelope did you put this money order in that you say you sent to the Treasurer of the United States? Was that to whom you say it was addressed? A. Yes, sir.

Q. Did you address the envelope yourself? A. Yes, sir; I did.

Q. Where; at your home or at the postoffice? A. At the postoffice.

Q. And you had never had any notices of premiums, so far as you knew; you never had seen any notice of premium from the government as to the premium being due, the amount of the premium to be paid; you had not seen any notice as to the amount and so forth? A. No, sir.

Q. You had, though, read this policy and you knew that it called for it? A. Yes, sir.

Q. Now, when do you claim you sent in the second premium, or did you send in the second premium? A. Yes, sir.

112

Q. When? A. In December, 1927.

Q. What time in December, if you remember; did you send it on the first day of December? A. No, sir; I did not.

Q. Did you send it on the second day of December? A. I do not remember that.

Q. Well, would it refresh your recollection to looks at these stubs, when you paid for the money orders, or obtained the money orders? A. Yes, sir.

Q. I show you these money order stubs and ask you to tell me. A. That was December the twentieth.

113

Q. And so that the premium which you claim was due the first day of December was sent December the twentieth? A. Yes, sir; it was.

Q. And what condition was Mr. Mahar in at the time you made this first remittance? First, you say you made this first remiittance on the second of November? A. Yes, sir.

Q. And what was his physical condition then? A. Very poor.

Q. Sick at home? A. Yes, sir.

Q. And was that the reason you happened to have him pay this premium? A. No.

114

Q. Was that the reason, because he was sick at home? A. No, sir; but because I had charge of all those things to pay and that was included with them.

Q. Well, as I recall, you told the jury here a

while ago that Mr. Mahar began to fail in his memory and especially as to financial matters in September and that you took over matter along about that time? A. Yes, sir; but I always talked with him about these things as I sent them in. 115

Q. And when the first of October came around did you talk with him about paying the premiums due the first of October? A. No, sir; I supposed it had been paid, the first of October.

Q. Well, I thought you said you took it over in September and was running the financial affairs from September on; that he did not pay, or was not paying any attention to his financial affairs? Now, this is October I am speaking about now; this is a month later. Now, can you give me any reason why you thought of it on the first of November and did not think of it on the first of October? A. No, sir. 116

Q. Well, he was not quite so well on the first of November as he was on the first of October, was he? A. No, sir.

Q. In other words, he was a little worse; wasn't he? A. Yes, sir; he was.

Q. Mr. Mahar, so far as you knew, was working during the month of September? A. Yes, sir.

Q. That is, he went out in the morning and came back at night? A. Yes, sir.

Q. And he rode, as you say, with his friend down to the shop most of the time? A. Yes, sir. 117

Q. And how long in October did he continue to do that? A. Until the seventeenth of October.

Q. Did Mr. Mahar have other kinds of health or sickness insurance during this time? A. Yes, sir.

Q. Do you know whether he ever made any

claim for payment on this health insurance? A. No, sir; I do not know.

118 Q. Did you know, as a matter of fact, that he was covered by a blanket policy issued through his employment with the railroad company for health? A. Yes, sir; I did.

Q. Did you know that he did receive benefits before he died from this, or through this company and the railroad company's representative? A. Yes, sir.

Q. As a matter of fact, one of his friends, the foreman, made the payments to him; didn't he? A. Yes, sir.

119 Q. Did you know anything about his making a claim for that health insurance, this other insurance through the railroad? A. The railroad insurance, you mean?

Q. Yes. Did you know anything about his making that claim? A. I supposed that the railroad employees had to be insured.

Q. Yes, I know, but I am simply asking you whether you knew anything about his making that claim? A. No, sir; I did not.

Q. You don't know who examined him or when he was examined? A. No, sir.

120 Q. But the money that was subsequently paid, so far as you know, was paid at your home or somewhere else? I am talking about this railroad matter now. A. The railroad insurance premiums, you mean?

Q. No, not the premiums, I do not mean the premiums, but I refer to the benefits? A. They were

brought over there by Mr. Melius.

Q. To the house? A. Yes, sir.

Q. When was the first one brought, if you recall; about when? A. In October, I think.

Q. But you do not know when he first made claim for that, do you? A. No, sir; I do not.

Mr. Tompkins: I think that is all.

*Redirect examination* by Mr. Bockes:

Q. Now, what about the Knights of Columbus insurance; when did he stop making payments on that and begin to— A. (Interrupting) Well, I don't remember just when it was, but I had a book with the amount due on that and when I looked at the book and found out it was due I sent it in, but with the government insurance there wasn't anything like that and I supposed it had been paid and so I didn't send it in.

Q. Well, you do say you did study this policy when it came? A. Yes, sir.

Q. And did you see the statement of quarterly premium of eleven dollars eighty cents? A. Yes, sir.

Q. And also the receipt for the thirteen dollars and ninety cents? A. Yes, sir.

Q. Which would not make it, with the days of grace, expire until November second, would it?

Mr. Tompkins: I object to that.

The Court: Objection sustained.

Mr. Bockes: An exception, please.

JUDSON MELIUS, called as a witness on behalf
124 of the plaintiff and being duly sworn, testified as follows:

*Direct examination* by Mr. Bockes:

Q. Where do you reside, Mr. Melius? A. Oneonta, New York.

Q. How long have you lived there? A. All my life.

Q. What is your business? A. Car foreman.

Q. How long have you been engaged in that occupation? A. About eighteen (18) years.

Q. For the Delaware and Hudson Company? A.
125 Employed by the Delaware and Hudson Company; yes, sir.

Q. And what are your duties as foreman in that department? A. I supervise the car inspectors and repairers in the transportation yards.

Q. Are you acquainted with the late James P. Mahar? A. I am.

Q. When did you become acquainted with him? A. Why, personally, about four or five years ago, but I had known him fifteen or sixteen years on the section, working in the section.

Q. Now, we will go back to when you first knew
126 him: What did you know about his health at that time? A. It was very good.

Q. I do not understand you. A. Very good.

Q. And did it continue to be apparently good until he came to work for you? A. Yes, sir.

Q. And from that time on and until when? A. Well, I should say along in September some time.

Q. Just what were the duties that he performed

under your direction? A. Well, he had to do the usual duties of that position; he was a car inspector and repairer and he had to follow the inspector up and make the repairs in the train, carrying a bag which probably would weigh twenty-five or thirty pounds on his shoulders and consisting of nuts and bolts and cotter keys and so forth. 127

Q. And what were they for, for the performance of what duties? A. Repairing cars; so-called light repairs in the yards; fixing brakes and so forth.

Q. And is it considered heavy or light work? A. Considered pretty heavy work.

Q. And did he do that steadily while working for you? A. Yes, sir.

Q. What sort of an appearing man was he, physically, Mr. Melius? A. Well, how do you mean; rugged? 128

Q. Yes, sir; or otherwise? A. Well, if I am not out of order, I would like to show you and refer you to juror number nine; if that is not out of order.

Q. You will not mind that? (The juror: No.) I thought you would not object to that. A. A rugged man; looked just like that.

Q. And did he continue rugged looking down to September, 1927? A. Yes, sir; he did.

Q. And before I forget it: Something was said upon cross-examination of the previous witness about an application for group insurance; now, it was you, yourself, who had charge of that; was it not? A. Yes, sir. 129

Q. Just explain to the jury what there was to that? A. Well, after a man is sick for seven days, it is the duty of the foreman to take an insurance

blank to his house or the hospital, wherever he happens to be, and have it filled out; if he does not, why, he is usually severely criticised by his superior for not doing it.

Q. And did you do that in this particular case? A. Yes, sir.

Q. You took it to the house? A. Yes, sir.

Q. So it was not anything Mr. or Mrs. Mahar instigated? A. No, sir; I am the one that has to do it.

Q. Now, tell the jury what you observed about a change in his physical health, if any, in September and what you did about it? A. Well, prior to September he was a man that while with the gang of men, he was usually joking with them, or fooling, and he done his work and everything with pep, and he was always full of life; well, then, he began to act different, no joking or fooling, kind of indifferent, as if he was not just right. Well, I spoke to him and he told me, well, he did not feel the best. That is all. And so it went along that way for a couple of weeks, and having another job there that requires a man to perform the work, but which is lighter work, I put him on that, and what we call a hump inspector, and that would consist of a man inspecting cars after they go over the hump to see what damage is done to them and making out rules 120 and 44, and if they are damaged, applying a tag to the car and sending the car to the repair track for the work to be done. He didn't have any manual work to do there.

Q. You say there was no manual work for him to do? A. No. I did that on account of the family and

figured he would regain his health and come back on his own job.

Q. Now, what is the fact: Did you have any lighter work under your control? A. No, sir; that was the lightest work I had there. 133

Q. And then he continued along until what time? A. Along in September some time.

Q. Did he go back to this heavy work at all? A. No, sir.

Q. And so from September eighth on, did he do any heavy work? A. No, sir.

Q. And he did nothing except this job you transferred him to during his sickness? A. That is all.

Q. Did the compensation insurance, in the group insurance, go through your hands? A. Yes, sir. 134

Q. And you were the one who delivered it to the house? A. I did it until I was taken sick along in May or June, for about six weeks or so, and then I told my gang leader to take that up.

Q. Did you see James P. Mahar after he left the D. and H. shop October seventeenth or eighteenth? A. I saw him a few times up to his house; usually interested in the men working for me and if they are sick I usually go and see them.

Q. How frequently did you see him there after he left the D. and H.? A. Well, I had to see him at least once a week, because I had to take the check there. 135

Q. Did you see him at any time at work around the house? A. No, sir.

Q. Physical or mental? A. No, sir; they usually sat there quiet and indifferent.

Q. What do you say with respect to whether at any time he seemed to be any better after he first began to be sick? A. No, sir; I would not say so;

I wouldn't say I saw him improve greatly, if at all. I met him one day down in front of the Brown House
136 and he said he was up to get his teeth out, that he had to have them out, and the next time I saw him was up at the hospital.

Q. Did you notice any apparent change of weight? A. Oh, yes.

Q. Just describe what you did notice in that respect and in his physical appearance generally? A. Well, the first thing I began to notice was the kind of yellow color, the yellow complexion, and then he just kind of dropped away; you see, he was quite a rugged man, with ruddy cheeks, and then he changed and just dropped away.

137 Mr. Bockes: That is all.

*Cross examination* by Mr. Tompkins:

Q. Mr. Melius, do I understand that you superintended the making out of this claim for the group insurance? A. Yes, sir.

Q. And did you have the applications and take them to the house? A. No, sir; they come from the office; I usually have some on hand, though.

Q. I mean, you took them up to the house? A. Yes, sir; I did.

138 Mr. Tompkins: I ask to have this paper marked for identification at this time.

(Paper marked Government's Exhibit Number 1, for identification, of this date.)

By Mr. Tompkins:

Q. I show you Government's Exhibit number one, marked for identification, and I ask you if that is a

copy of the paper which you took up for him to sign? A. It is.

Q. You say it is? A. Yes, sir; it is. Just a 139
moment, please. (Witness examines same.) Yes, sir.

Q. And you saw Mr. Mahar sign this paper? A. Yes, sir; I did.

Q. Government's Exhibit number one for identification? A. Yes, sir.

Q. Do you recall now the first date that you delivered any compensation, as the result of this application, to Mr. Mahar? A. Well, he would have to be off for seven days before he would draw any compensation and it would be a matter probably of
five or six days before the first check came and some- 140
times a week, and after that they would come regularly; and so it would be along about the first of November; along in there somewhere, I would say.

Q. That was the first payment which had been made? A. Yes, sir.

Q. Did you get all these papers together and sign and send them yourself, send them in yourself, or just the application made by him? A. Just the one paper we fill out, you see.

Q. This yellow paper? A. Yes, sir; it is filled out and then taken to our office and then mailed to the Albany office and on through the channels, I sup- 141
pose, to the New York office.

Q. Now, did you secure the physician's statement? A. No, sir; he does that; he does that; he calls the physician because he usually has it filled out that way. I don't know.

Q. Was the paper filled out when you got it? A.

No, sir. Let's see. When I received it back, you mean?

142 Q. Yes. A. Yes. Oh, yes.

Q. That is, when you got it back it was filled out? A. Yes, sir; when I got it back it had to be filled out.

Q. In its present form? A. Yes, sir.

Mr. Tompkins: I offer Exhibit 1 in evidence.

Mr. Bockes: No objection.

The Court: Received.

(Application for group insurance, etc., received in evidence and marked Government's Exhibit Number 1, of this date.)

By Mr. Tompkins:

143 Q. Now, briefly, Mr. Mahar's regular duties involved quite a little physical power; did they not? A. Oh, yes.

Q. He had to lift heavy weights or heavy pieces of material? A. Well, no, not too heavy; they were not—oh, well, the knuckles, I would say, would weigh seventy-five or eighty pounds; that was the heaviest; he would have to lift them up and put them in the couplers and put the pin in.

Q. He would have to lift this seventy-five pound weight up and put it in some part of the car? A. Yes, sir.

144 Q. And it required quite a lot of physical strength? A. Pretty good deal; yes, sir.

Q. About how much would you say that Mr. Mahar weighed when he was in his regular state of health before this accident, or sickness? A. Well, I would say, he was a short man, he wasn't very tall, I would say one hundred and eighty-five or one hun-

dred and ninety pounds; along in there; he was a good weight.

145 Q. Now, did you take his time, or did you see when he came to work every day? A. Every day.

Q. And what time was he supposed to report in the morning? A. In the afternoon; he went to work at three o'clock in the afternoon.

Q. He went to work at three o'clock in the afternoon? A. He went to work at three o'clock in the afternoon and he worked until eleven o'clock at night.

Q. And worked until eleven o'clock at night? A. Yes, sir.

146 Q. And during this time up to October nineteenth, when he quit work, did he report every day during these last few weeks? A. Very steady worker; he was very steady.

Q. He came promptly at the appointed time in the afternoon and stayed his full hours? A. The full time; yes, sir.

Q. Was there any deduction in his pay, or any change in his pay during this period, this first period and the latter period of his work there? A. No, sir; this work I put him on had to be performed by somebody and I took the other man off because he was a good rugged man and put this other man on

147 Q. And he did that work properly? A. He did that work properly.

Q. And he received the same compensation all the way through? A. Yes, sir.

EARL C. WINSOR, called as a witness on behalf
148 of the plaintiff and being duly sworn, testified as follows:

*Direct examination* by Mr. Bockes:

Q. Doctor, are you a duly licensed, registered and practicing physician and surgeon in the State of New York? A. I am.

Q. And you have been for how long, Doctor Winsor?

Mr. Tompkins: The Government will admit his qualifications.

By Mr. Bockes:

149 Q. How long have you been acquainted with the late James P. Mahar? A. Well, I saw him nine or ten years.

Q. Were you his family physician during that time? A. Yes, sir.

Q. What did you notice about his appearance of health and in your attendance on the family, up to September, 1927? A. I had treated his family for everything, except himself; he had never been sick, as far as I know, previous to that.

Q. You attended at the childbirths, when the children were born? A. Yes, sir.

150 Q. And you were his regular family physician; as I understand it? A. Yes, sir.

Q. Now, was there anything about his appearance that attracted your attention in September, 1927? A. Yes, sir.

Q. What? A. I had not seen him in quite some time and he had changed so materially; I met him

on the street in Oneonta and he said: "Hello, Doctor", and I stopped to pass the time with him and visit with him as we always did when we met, and he was emaciated and looked pinched and worried, and so much so that I asked him, I said: "Jim, what is the matter with you?" "Well", he says, "I do not feel very good." I asked him if he was working and he said "yes", that he was trying to and he said, voluntarily, I was not drumming up any business, you know, he volunteered the fact that if he did not feel better shortly he was coming up to see me, and I told him that he better do that because he looked bad. 151

Q. Well, did he afterwards see you? A. He did, about the—I think, now, that I saw him on the street in Oneonta along, well, I would say it was around the middle of September, and he did not come to my office until October seventeenth, I think. 152

Q. Now, state what you observed and found out upon your examination of him on October seventeenth? A. Well, physically, he was run down, he had lost a great deal of weight; I could not swear to just how much his ordinary weight was because I never weighed him, I never had occasion to weigh him, and I should say that he was a man that weighed around one hundred and eighty or one hundred and ninety pounds, and at the time he was in the office he only weighed around one hundred and sixty-five pounds; he had lost about twenty-five or twenty pounds, since I had seen him last. Now, at the first office visit he was not jaundiced. His color was very peculiar; there was a yellow tint and 153

a sallow appearance and blend of his skin, which was just a prodromal symptom of jaundice; and I
154 did not consider, I did not think he was serious, because I did not think he could be seriously ill, being a man of such robust physique, but I turned it off rather lightly the first time, and I attributed the fact to a catarrhal jaundice and gave him the usual medical remedies which were of absolutely no avail; he did not respond in any way, shape or form, and on one of the subsequent visits which were once, at least once a week, up to the time he was sent to the hospital, I called Doctor Brinkman in consultation. Nothing I gave him did any good whatsoever and he continued to run down all the time.

155 Q. Just a minute. Doctor, do you remember about what time Doctor Brinkman was called into consultation? A. Why, I think it was along about the middle of November, or perhaps a little after that.

Q. Well, now, Doctor, when you gave him this examination when he came to see you in October, what would you say as to whether or not he was totally and permanently disabled or incapacitated?

Mr. Tompkins: I object to that as incompetent and the witness not shown qualified to answer, and
156 further I object to any further testimony along this line as it now appears this policy had lapsed before any of these happenings with Doctor Winsor too took place, except perhaps the meeting on the street in Oneonta in September, and this is after the middle of October that he is offering proof now.

The Court: I will overrule that objection.

Mr. Tompkins: An exception.

The Court: Doctor, from your examination at that time are you in a position where you can base an opinion upon your examination, without any future happenings, as to the future probability of his disability? 157

The Witness: Yes, sir; I am.

The Court: The objection is overruled.

Mr. Tompkins: An exception.

By Mr. Bockes:

Q. The Court says you may answer. A. What is the exact form of the question?

Q. The stenographer will read it. 158

(The stenographer repeated the question as follows:

"Question: Well, now, Doctor, when you gave him this examination when he came to see you in October, what would you say as to whether or not he was totally and permanently disabled or incapacitated?")

A. Well, there was such a change in his physical condition that during the examination I stripped him in the office and put him on the table, and nothing suspicious as far as internal complications went, as I recall, except he showed some rigidity over the right rectus muscle in the region of the gall bladder, but I felt a robust man who was going down as rapidly as he was and knowing him as I did, I felt that he should cease work—— 159

Mr. Tompkins (Interrupting): I object to any further testimony as to what he felt about it.

The Court: Yes; objection sustained.

The Witness (Continuing): —and knowing him

as I did, I ordered him to cease work on the first visit at the office, which he did.

160 The Court: Let me ask you one question: And that is the time you say that you treated him for a jaundice?

The Witness: The first time he came to the office.

The Court: Well, at that time, there was nothing to indicate, or was there anything to indicate that he was, or would be permanently disabled in the future?

The Witness: No, sir; I could not draw the curtains aside as to the future at that time.

The Court: Well, that is why I asked this question. You are being asked if you could tell, and I 161 say you may answer if you could tell at that time and not from future happenings, but if you can express an opinion from that one examination at that time, I will allow you to answer, but not an opinion as you now look backwards.

The Witness: I see the point and, as I say, I ordered him to stop work.

Mr. Tompkins: I object to that as not responsive.

The Court: That part of it may stand: "I ordered him to stop work."

Mr. Tompkins: An exception.

By Mr. Bockes:

162 Q. Well, was that because he was incapacitated from any kind of work, mental or physical? A. Yes, sir.

Q. You say "yes"? A. Yes, sir.

Q. Now, from your examination and the observation on September fifteenth, or thereabouts, and this subsequent examination, are you able to state when

he first became incapacitated from any kind of labor?

Mr. Tompkins: I object to it on the ground it refers to some subsequent examination and it does not appear when or what and we ought to be able to judge as well as the doctor—— 163

The Court (Interrupting): Overruled. I will take it.

Mr. Tompkins: And an exception.

By Mr. Bockes:

Q. The Court says you may answer. A. The question again, please?

Q. The stenographer will repeat it.

(The stenographer repeated the question as follows: 164

"Question: Now, from your examination and the observation on September fifteenth, or thereabouts, and this subsequent examination, are you able to state when he first became incapacitated from any kind of labor?")

Mr. Tompkins: I submit the answer to that question should be "yes" or "no."

The Court: Yes.

The Witness: Yes, sir.

By Mr. Bockes:

Q. And when was that time, in your opinion? A. Well, as I ordered him to cease work immediately, I felt at that time that it had already gone too far. 165

The Court: And that was October seventeenth?

The Witness: That was October seventeenth.

Mr. Tompkins: I object to that as not responsive and I ask that it be stricken out.

Mr. Bockes: I will consent that go out, and I will

repeat the question to the witness.

166 By Mr. Bockes:

Q. When was it, in your opinion, he became incapacitated from any kind of labor? A. Well, I should surely say by the first of the month, and perhaps before that. He certainly was not in shape to work when he came to my office; I do not see how he could have worked.

Q. And in your opinion he could not work for two weeks before or more? A. Well, at least that, and from the time I saw him on the street in Oneonta, and unless he had a very soft job, I do not see how he could have worked.

167 Q. Now, perhaps I interrupted you. Go on and state just what you did in the way of attending him from this October examination on? As I remember it, you said you attended him once a week or oftener? A. Yes, sir. He came up to the office as long as he was able to ride and then I was down there several times, and there were the various technical things, as blood examinations and other tests, which I did, to try to straighten the tangle out, and, as I said, there was nothing apparently that I could do, and until I told him that I felt that I had treated him long enough, and that he had waited plenty long enough

168 before he came to me, and I advised him to get a consultant, and he asked me to whom I advised him to get, and I told him Doctor Brinkman in Oneonta.

Q. As I understand you, you continued to see him up to the time of his death? A. Yes, sir.

Q. Did he at any time get any better than he was when you saw him in October? A. No, sir; he did not; he got worse.

Mr. Bockes: You may examine.

*Cross examination* by Mr. Tompkins:

169 Q. Did you sign a report, Doctor, for an application for compensation under this blanket policy carried with the Metropolitan on the railroad employees? A. Yes, sir; I did.

Q. Did you see the statement made by the decedent at that time, which is just above your certificate? Did you see this statement: When were you first unable to work? A. I do not know as he had had that made out when I filled out my part. You see, they bring them in and there is the physician's part and I filled this in, and this, well, I do not know whether this was filled in previous to that, when I 170 filled that out, or not.

Q. You do not know whether it was or not? A. No, sir.

Q. You recognize the signature below that answer to that question; don't you or do you? A. I would say probably it is his signature; I am no expert, however.

Q. Do you think you are more capable to judge whether the man was able to do his work or not than he was himself? A. I thought I was; yes, sir.

Q. Well, if a man did work, would you consider him able to work? A. No, sir. 171

Q. In other words, if he was incapacitated and could not work and then did work, why, he is wrong; he could not have worked; is that the way you want to be understood? A. He did work, but it was not for his best interest.

Q. Oh, well, that was not the question. You said he was incapacitated? A. Yes.

Q. What do you mean by "incapacitated", Doctor? A. By "incapacitated", I mean inability to work.

172

Q. Yes. Now, if the man said the first day he was unable to work during this period was the seventeenth of October, or the nineteenth of October, at three o'clock P. M., then would you say that your opinion was better than the decedent's? A. From my standpoint, it certainly would be.

Q. Well, if a man did work, then he was not incapacitated; was he, Doctor? A. Well, the effect was plain enough, he did work; no question about that.

Q. What do you mean by being incapacitated?

173

A. And the fact he had to have his job changed would be evidence, I think, he certainly could not do physical work.

Q. Well, if he did and he certifies it, then you must be wrong in your opinion he could not? A. He told me down in Oneonta, he said: "I can hardly work; hardly do my work."

Q. Hardly? A. Away back in September, September fifteenth, or some time thereabouts.

Q. Is it your observation that persons afflicted with jaundice always die from the effect of jaundice? A. No, sir.

174

Q. Is jaundice considered an incurable disease? A. A jaundice is a symptom and not a disease.

Q. Well, how do you distinguish or differentiate between a symptom and a disease? A. Well, a disease shows pathology and a symptom is a manifestation of disease pathology.

Q. Then, to your mind, if a man had jaundice, it

would simply mean that he has got yellow skin or something like that? A. Not a yellow skin, but an appearance that is due to a bile pigment in the skin. 175

Q. Did you accompany him to the hospital when he was operated? A. Yes, sir.

Q. Did this operation disclose any condition, physical condition which would have made it impossible for Mr. Mahar to survive? A. Yes, sir.

Q. Prior to the operation, or at the time of the operation and prior to it, what do you say? A. Prior to the operation, the physical findings, as I told you, were very scant, and with the exception of the rigidity over this particular region, but there was no means of identity of the trouble, it being up under the ribs at that point. 176

Q. Did Mr. Mahar die as the result of his condition or as the result of the operation? A. As the result of a combination, perhaps, of both.

Mr. Tompkins: I think that is all.

*Redirect examination* by Mr. Bockes:

Q. Could he have lived, in your opinion, if he had not been operated upon? A. No, sir.

Q. I notice that Doctor Brinkman, through mistake, signed the death certificate: What was the cause of his death? A. The operation—I think perhaps Doctor Brinkman should tell, he being the surgeon, but there was a mass, a nodular, irregular shaped so-called tumor or mass, perhaps the size of a small grape fruit, which lay in the region of the bile ducts of the gall bladder, which we removed, and taking that size mass from the peritoneal cavity sometimes means considerable shock; his condition 177

was not any too good after the mass was removed and subsequently, I think about three or four hours, he very suddenly died, as some cases do, where even the shock is not so very great, from what we determined to be a pulmonary embolus.

Q. And you have all those conditions in mind when you say that in your opinion he was actually unable to work after the last of September, or before? A. Yes, sir.

Mr. Bockes: That is all.

*Recross examination* by Mr. Tompkins:

Q. What do you mean by a "pulmonary embolism", Doctor? A. A mass of material which might be clotted blood, or it might be a vegetation from any endothelial surface diverted into the blood stream and circulating until it finds a smaller artery than that which was carrying it, which plugged the vessel, and the death resulting or ensuing from that, and when it reaches a vital area it is of very short duration.

Q. And that plugging and so forth, as you describe it; is that necessarily in the location of the operation itself? A. No, sir.

Q. And do you now say that Mr. Mahar died as the result of disease or as the result of this operation? A. I think I said, and I repeat, that he died as a result of a combination of the two. One was the disease and the other was the accident, in that the thrombus hit some vital tract, and I think it is very easy to anybody to see how that is one of the accidents of surgery.

Q. Did Mr. Mahar die as the result of an acci-

dent of surgery? A. He did not. He died from a combination of a disease and the operation, as I first stated. 181

Q. Who performed the operation? A. Doctor Brinkman, assisted by myself.

Q. You would not criticise Doctor Brinkman's act in performing this operation, unless you had some ground for it, would you, Doctor? A. No, sir.

Mr. Tompkins: That is all.

*Redirect examination* by Mr. Bockes:

Q. Have you any ground for criticising it? A. No, sir.

Q. And I believe you said that in your opinion the disease conditions were such that the decedent, Mr. Mahar, would have died if the operation had not been performed, from that disease? A. Yes; in a very short time, perhaps just a very few days. 182

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GEORGE H. BRINKMAN, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

*Direct examination* by Mr. Bockes:

Q. You are a duly licensed, registered and practicing physician and surgeon, Doctor Brinkman? A. Yes, sir. 183

Q. Where do you reside? A. Oneonta.

Q. How long have you practiced? A. Forty-four years.

Q. Did you sign the death certificate upon the

death of James Patrick Mahar? A. Yes, sir.

184 Q. Well, what was the cause of death? A. Chronic cholecyetitis and cholangitis, as the primary cause, and the secondary cause, pulmonary embolism.

Q. Now, what are your qualifications to testify as an expert upon this disease, Doctor Brinkman? A. I did not know that I was an expert.

Q. Well, as a specialist, then, or as a person competent to express an opinion? A. Well, it was my experience in surgery and my preparatory study thereof.

185 Q. And what has that experience been and that study? A. Well, I have been practicing surgery for some time; I practiced the general practice up to 1910, with a minimum amount of surgery, and since 1910 I have done quite a lot of surgery.

Q. And have you followed up your regular medical and surgical course with a special course afterwards? A. Yes, sir.

Q. Now, go ahead and tell the Court and jury what you know about this case of James Patrick Mahar? A. I never saw James Mahar until November of 1927, at least then, and I think he came to see me twice. I can only find a record of his coming there

186 November twenty-one, 1927. At that time I could not judge of his loss of flesh, because I never had seen him before. He was thin, and he was very profoundly jaundiced and, as he expressed it to me, he was extremely weak. On the examination of his urine I found it loaded with bile. He told me his stools, by that I mean the bowel movements, were white, which indicated an absence of bile, and he had

a tender rigid place in his abdomen directly over the gall bladder.

187 Q. Did this condition appear to be of sudden arrival or occurrence, or was it something that had been bothering him for some time? A. I can only tell you that from the history he gave me and I cannot be definite about it as to just how long these conditions had existed, but they had been gradual in their onset.

Q. Well, then, you were called in in consultation with Doctor Winsor on this case? A. Yes, sir.

Q. And what did you decide upon, if anything, at that time? A. Well, at that time he returned to his home and continued under the care of Doctor Winsor. It did not seem to me at that time to be a medical condition, but medical treatment was continued. 188

Q. And what happened then? A. Well, I may have seen him again; I do not know whether I did or not, but on the twenty-third of December he was brought to the hospital and I examined him there and found the same conditions present in a more marked degree, and the next morning, the morning of December twenty-fourth, we operated him, Doctor Winsor and myself, the anaesthetic being given by Doctor Getman.

Q. And when did he die? A. He died that afternoon. 189

Q. Now, something was said about some accident in the operation; was there any accident? A. There was none.

Q. And was his condition such that that operation, in your opinion, was necessary? A. What is it?

Q. And was his condition such that in your opinion that operation was necessary? A. Yes.

190

Q. And could he have lived for many days or weeks if he had not had that operation?

Mr. Tompkins: I object to it on the ground it calls for a conclusion of the witness, and asking for facts, and he has not been asked for an opinion but——

The Court (Interrupting): Well, in your opinion, Doctor?

The Witness: Why, I do not think it was a matter of days; no; but I do not think it was a matter of a very long time. When you come to specify the days a man has to live, you are assuming quite a lot, of course.

191

The Court: Proceed.

Mr. Tompkins: My objection is overruled?

The Court: Yes; overruled.

Mr. Tompkins: An exception.

By Mr. Bockes:

Q. When you say "a very long time", or "not a very long time", that is pretty indefinite, Doctor; now, what do you mean by "not a very long time"? A. Why, in my opinion, he might have lingered along a month; I do not know how long a time, how long he would live. I have been fooled too many times about things like that to attempt to state positively or definitely.

192

Q. That is your best opinion about it, Doctor? A. My opinion is that a month would have been the limit under his condition, the way he was going.

Q. That is what I meant. A. Yes.

Mr. Bockes: You may examine.

*Cross examination* by Mr. Tompkins:

193

Q. Doctor, is jaundice a condition or a disease? A. It is a symptom.

Q. What? A. It is a symptom.

Q. Will you explain to the jury, if you are able, Doctor, just how Mr. Mahar came to succumb as the result of this operation, not in medical terms? A. I shall avoid medical terms as far as I can.

Mr. Mahar was a good deal weakened as the result of his disease; his condition was not good, but it was getting no better, it was getting worse. He had some condition, we knew, that obstructed the flow of bile from the liver to the intestines; that was what produced his jaundice. What that condition was, we did not know. But we do know that where a condition of jaundice persists for that length of time, it probably is not an acute condition, but probably some chronic condition; and if I may be permitted, and if I am wrong, stop me, my opinion was when I operated Mr. Mahar, that he had a chronic inflammation of the gall bladder, together with possible gallstones.

194

He had the chronic inflammation of the gall bladder and he had no stones, but he had a growth involving the walls of the gall bladder which blocked the passage of bile from the liver to the intestines, where it should normally flow. Now, if it does not go there, it is absorbed from the liver into the blood and is passed out through the tissues, and hence the jaundice might be the result of gallstones, might be a swollen membrane, a cancer, or any one of a half

195

dozen different things that could produce that jaundice; jaundice is merely a symptom of obstruction, and what the obstruction is has to be determined in some other way.

196

Q. Well, you did not get the point of my question, Doctor, as to how he came to succumb as the result of the operation? A. Well, I guess I did neglect that.

His condition, as I said, was not good. Operations in the upper abdomen are productive of a considerable degree of shock, and when he left the table he was mortally shocked as the result of that. I stayed with him for some time after the operation. He seemed to recover quite considerable from the shock; his pulse improved and his skin became warm; he was generally better.

197

Later on I was called back. He had suddenly developed symptoms of what we call pulmonary embolism, that is, the lodgement of something in the vessels between the heart and the lungs, symptoms of which are very pronounced, a very definite dyspnea, cyanosis, and if you don't know what that is, the "dyspnea" is difficult breathing and "cyanosis" is bluishness, and the end comes very quickly, and it did come very quickly, and I think in twenty minutes from the time of the development of the cyanosis symptoms he was dead. I hardly had time to more than get to the hospital.

198

Q. Now, if I may be allowed to ask you a little further: The result of this blood clot caused what, by that stoppage of the heart and lungs, or this lodgement in the vessel between them, as you ex-

press it? A. Well, if you asked me to tell the exact mechanism by which it produces death, I probably am unable to do that, but if blood cannot flow from the right heart into the lungs, it cannot be oxygenated by breathing and that is what causes the blueness, and, of course, a man cannot live without oxygen in his blood. 199

Q. Have you performed many of these operations? A. Do I?

Q. Have you? A. Yes, sir; a great many; every case is different from another case; there are no two cases alike.

Q. Are such conditions as found in Mr. Mahar often remediable by operation? A. If the growth is removable and is not malignant, they succeed frequently; a good deal of risk to it, we think. In cases of gallstones, or chronic cholangitis alone, the degree of success, the percentage of success is high and the mortality is low. 200

Q. And then you had every reason to expect a successful termination of this operation in this case, did you not, Doctor? Did you have reasonable ground to expect it? A. Reasonable ground, yes. We did not expect that Mr. Mahar would make a complete recovery without a subsequent operation, and after the operation was over and the growth which was removed was examined, I questioned whether anything more could be done; it was not examined at the laboratory, but it had the gross appearance of a section of carcinoma tissue, carcinoma being a cancer. 201

Q. Now, Doctor, you stated that the proximate cause of this death was this blood clot? A. Oh, no,

I did not state that.

202 Q. Did you not? A. I did not. I said he was shocked; he would have died from the blood clot with nothing else, but there is the shock, the shock possibly would have been sufficient without the blood clot; we cannot tell when a person begins to recover from shock that it is going to be permanent. Shock often goes on for hours after an operation is performed.

Q. Well, what is the nature of this contributory cause of death which you have stated in your death certificate, Doctor? A. The contributory cause was pulmonary embolism.

203 Q. Well, as I understood you, maybe I am wrong, that was caused by the effect of the blood clot in the artery, was it not? A. Well, in making out death certificates, of course, it is necessary to state, first, what is the primary cause, the pre-existing condition and, second, the contributing cause, or anything that develops later.

Q. Well, now, just so we won't mislead the jury: Was it or was it not the result of this blood clot in the artery? A. He could not live with the blood clot in the artery.

Q. What? A. He could not have lived with the blood clot in the artery.

204 Q. And he did have the blood clot in the artery, according to your death certificate? A. What is it?

Q. He did have the blood clot in the artery, according to the death certificate here? A. He did not have an autopsy, but that was my judgment.

Q. And the blood clot, was that a result of the operation? A. I don't know. Blood clots develop

in an artery, and embolisms develop where there have been no operations, and they have a number of times in my own experience. 205

Q. Did Mr. Mahar die as the result of accidental surgery? A. No, sir. Now, I want to know what you mean by "accidental surgery", if I may. The surgery was not an accident; it was performed as the result of a plan.

Q. Well, was it an accident as the result of the surgery which you performed? A. I don't know. I do not know whether the embolism was due to the surgery, or whether it would have developed without surgery. I cannot tell you that. It does occur with and without operations. It follows child birth; it follows various conditions; it will follow varicose veins, and a great many other conditions, and so when you say or ask positively, what caused the embolism, I do not know. 206

Q. No, but if you just performed an operation and with its attendant laceration and the blood flowing, and the man has died of embolism caused by a blood clot, would you expect that this was a coincidence that the blood clot arose from some other cause? A. What is this about laceration, you say?

Q. Well, with your cuts and the blood flowing? A. We did not lacerate.

Q. Well, what did you do? A. We cut. 207

Q. All right. You cut, and that caused the blood to flow? A. Well, it caused blood to flow, but not inside the vessel; it causes a flow of blood outside of the vessels, the cut-off vessels.

Q. Do you expect, Doctor, that this blood clot in the artery was caused by the operation or by some

diseased condition? A. Well, I just answered that a few minutes ago and told you I did not know.

208 Q. I am asking for your honest opinion about it, Doctor? A. It may have come from either one; I do not know what it did come from.

Q. Well, if it did come from disease, it would be a remarkable coincidence that it followed just after this cutting and the flow of blood, which might produce it in and of itself? A. The flow of blood had absolutely nothing to do with it. I do not know where you get the flow of blood.

Q. Well, where do we get the blood clot in the artery? A. Well, we do not get it from any blood that flows outside of the vessel.

209 Q. You might have got it inside from cutting him open? A. It was all over then.

Q. Well, the cut might have produced it? A. Produced what?

Q. Produced the blood clot and caused it to flow? A. It was already flowing; the blood that was in the vessel, that did not flow out. I do not believe I understand you. Either you don't know or I do not get what you mean; I do not get the significance of your question.

Q. Well, I will ask this generally: I would like to know whether this embolism, pulmonary embolism, came as the result of the operation or came as

210 the result of disease; I would like to know that? A. I suppose I will have to say what I did before.

Q. Will you give me an honest opinion as to that now? A. I haven't any; I don't know; it could come with or without.

CARL CONROW, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows: 211

*Direct examination* by Mr. Bockes:

Q. Mr. Conrow, where do you live? A. Oneonta, New York.

Q. What is your business? A. Gang leader.

Q. Were you assistant foreman under Mr. Melius? A. Well, assistant foreman and gang leader, acting gang leader.

Q. And were you acquainted with James P. Mahar of Oneonta? A. Yes, sir.

Q. How long did you know him before his death? 212
A. Oh, I would say in the neighborhood of three years.

Q. And I have a memorandum here that for about two years prior to his death, you worked with him? A. Yes, sir.

Q. What was the work that he did for the D. and H.? A. Well, his detail was car inspector and repairer.

Q. Just tell the jury what that work was again. A. Well, he inspected the cars as they came into the yard, and then make such as the light repairs, like anything being off, nuts and so forth, make them, or 213
put them on; make the light repairs.

Q. Something was said about a tool chest which he had to carry with him? A. Well, that was a bag that the repairers have to carry their nuts and cotter keys and things like that in.

Q. Now, do you know of any change in his work

in the month of September, 1927? A. Why, I remember he was transferred; yes, sir; from the receiving yard to hump inspector.

214 Q. Do you know why? A. Well, on account of his—well, it seems to me it was on account of his physical condition. I remember once that he said——

The Court (Interrupting): Do you know why, or do you not?

The Witness: Well, it was because he was gradually, well, that he was, well, he could not do his regular duties as he had done theretofore.

By Mr. Bockes:

Q. As a matter of fact, did he have help? A. What?

215 Q. As a matter of fact, did he have help? A. Well, yes; the boys, different ones, helped him.

Q. And I wish you would tell the jury just what you observed about his physical condition in connection with the time that he was transferred from his regular work to this light work? A. Well, he gradually, I should say he was getting thinner, and he seemed to lose weight and to lose his pep, and he didn't seem to have the life like he had it before, and through his foreman, Mr. Melius, he was given this hump inspector's work as a lighter work to do.

Q. And even in this work, did his friends help 216 him to some extent?

The Court: Well, were you there when he was doing his work as hump inspector?

The Witness: I was gang leader; yes, sir.

The Court: Was he working under you on both jobs?

The Witness: Yes, sir.

By Mr. Bockes:

217 Q. What I am asking you about is help for him when he took this light job? A. Well, I do not remember as to that, but he had help when he went down on the hump as hump inspector.

Q. And you worked with him, I think you said, two years; was it? A. Why, approximately two years; I could not tell exactly; I know I was promoted from car inspector to gang leader in 1926, April fifteenth, 1926, and at that time he was working on the middle shift and he came under my supervision. Of course, I had seen him before that; as I would be getting through at three o'clock he would be coming to work.

218 Q. And when, or what time in September was it that you remembered such a change in his physical appearance? A. Well, it was some time in September; I could not tell exactly the date; I haven't any record of the date.

Q. It was also in that month that he was transferred? A. Mr. Melius has records of the dates and he keeps the time book. It was in that month that he was transferred.

Q. Just describe what the duties were on what you call the hump job. A. Well, it is after the cars have had receiving yard inspection and they come in with an engine and what we call putting them over the hump, that is a grade up and down, where they go up and down over the hump, and sometimes they have what we call hump damage, like loads being shifted and so forth, and that was his work, to see these cars, after they had been over the hump and,

219

in case there was something wrong, he would take
220 care of it and put the repair cards on the cards and put a report in on the same to the yardmaster.

Mr. Bockes: That is all.

Mr. Tompkins: I do not think I have any cross examination.

Mr. Bockes: That is all of this witness, then. I will next call Mr. Hitchcock.

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ERASTUS HITCHCOCK, called as a witness on behalf of the plaintiff and being duly sworn, testified
221 as follows:

*Direct examination* by Mr. Bockes:

Q. Where do you reside, Mr. Hitchcock? A. Oneonta, New York.

Q. Were you acquainted with the late James P. Mahar? A. I was.

Q. Did he live near you? A. Two blocks away.

Q. And did you go back and forth together to work; were your hours the same? A. We did and they were.

Q. And how long did that continue? A. Well, we were going back and forth, oh, for about a year or a
222 year and a half.

Q. During the years 1926 and 1927? A. Yes, sir.

Q. And were you present when James P. Mahar made his application for reinstating his federal life insurance? A. I was with him the day he mailed the application.

Q. And did you talk with him various times about doing it before that? A. Yes, sir.

223

Q. Do you know about his dropping some smaller policy and taking this, and planning to take this as a substitute? A. Well, yes; he was talking about dropping one, but I could not say whether he did drop it or not.

Q. I wish you would give a description to the jury of him as he was previous to September. A. Well, he was a fellow weighed about one hundred and eighty to one hundred and ninety pounds; he was about five foot, three or four tall, and he was robust and ruddy faced and rugged.

Q. Was he a steady worker? A. Steady worker; yes, sir.

224

Q. And what kind of work did he do? A. Car inspector and repairer.

Q. And, now, soon after the first of September, there was a change; was there not? A. Yes, sir.

Q. And just describe that to the jury.

Mr. Tompkins: I object to it as assuming a fact not proven.

By Mr. Bockes:

Q. Well, was there a change in his appearance soon after the first of September? A. In his appearance?

Q. Yes. A. There was.

225

Q. And just describe that to the jury. A. Well, his eyes kind of looked like kind of yellow, and his skin turned kind of yellow, and he lost weight, considerable, and then he complained most every night, he didn't think he would be back to work the next day, but he said he really had to on account of the

payments he had to make on his house.

Mr. Tompkins: I object to this.

226 The Court: Objection sustained.

By Mr. Bockes:

Q. We could not hear you very well. What did you say about complaints? A. He wasn't feeling very good and he didn't think he would come to work the next day and couldn't take care of his work.

Q. And when was it he said that? A. About the middle of September.

Q. And did you know about a transfer of James P. Mahar from the job he held with you to some other job? A. Yes, sir.

227 Q. And when was that? A. Well, I could not say exactly what date that was.

Q. Well, was it in the early part of September? A. Well, around the early part of September, I think.

Q. Do you know what the nature of his work there was? A. You mean after that time?

Q. Yes. A. To inspect cars after they go over the hump and to specify the various points and specific damages, if any.

Q. And did that last job involve making any repairs himself or handling any tools? A. No, sir.

Q. And what about his condition, his conversation and general manner and conduct, after September?

228 Mr. Tompkins: I object to this as leading and assuming a fact not proven.

The Court: Well, overruled.

Mr. Tompkins: An exception.

The Witness: Well, he didn't seem to take any interest in his work.

Mr. Tompkins: I object to that and move to strike it out.

The Court: That may go out. 229

Mr. Tompkins: He cannot characterize it.

The Court: It may go out.

By Mr. Bockes:

Q. And did you know of his working around home before and after September first, or September eighth? A. No, sir; I used to see him working in the garden quite often during the summer.

Q. Did you ever see him after September eighth work in the garden? A. No, sir.

Q. Or do any work around home after September eighth? A. No, sir; about every time I went over there he was always sitting on the porch, generally, or in the house. 230

Q. And before the first of September, how was he with respect to his being busy around the house? A. Well, he was always, when I found him at home, he was always doing something.

Mr. Bockes: You may examine him.

*Cross examination* by Mr. Tompkins:

Q. Are you the gentleman that took Mr. Mahar to work; are you the one that called to take him down to work; did he ride with you? A. Yes, sir; he rode with me part of the time and part of the time I rode with him. 231

Q. You both had a car? A. Yes, sir; we did.

Q. And you went to work together? A. Yes, sir.

Q. And during all this time from in September, 1927, down to October nineteenth, 1927, did he go to

work every day; that is, every working day? A. Yes.

232 Q. And you were on time; you had to report at three o'clock and you were on time? A. Yes, sir.

Q. And he stayed for the period of his work? A. Yes, sir.

Q. And this change of occupation you speak of; his regular duty was assigned to some other employee and he did that other man's work, did he not? A. Yes, sir.

Q. And somebody had to do that work? A. Yes, sir.

Q. And he did that work satisfactorily, did he not? A. As far as I know.

233 Mr. Tompkins: That is all.

Mr. Bockes: That is all.

The plaintiff rests.

Mr. Tompkins: The defendant moves for a nonsuit, if the Court please, on the ground that the plaintiff did not prove the cause of action, specifically, upon the ground that the plaintiff has not proved the policy was in force and effect, and it had lapsed prior to the death of the decedent, and, secondly, from out of the mouths of the plaintiff's own witnesses it has been proved that the decedent was

234 not totally and wholly disabled during the period within which he had time to pay the premium, but on the contrary he was regularly and gainfully employed.

The Court: I will hear you gentlemen on the motion.

Because of the hour, gentlemen of the jury, we will take an adjournment at this time.

You will not discuss this case amongst yourselves or allow anyone to speak about it in your hearing; you will also refrain from reading any mention of the case in the newspapers, if any there be. 235

You may now be excused until tomorrow morning at ten o'clock, this place.

Now, may I see the policy in this case, gentlemen?

Mr. Bockes: Yes, your Honor.

(Same handed to and examined by the Court.)

(Discussion outside the record which the stenographer was directed not to take.)

Adjournment taken until Tuesday morning, May tenth, 1932, at ten o'clock, same place. 236

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Morning session, Syracuse, New York, Tuesday, May tenth, 1932, 10:00 A. M.

Presiding: Honorable Frederick H. Bryant, United States District Judge.

Appearances:

(Same as before.)

(Roll of jurors called and all found to be present.)

The Court: The motion for nonsuit is denied, with permission to renew.

Mr. Tompkins: I take exception to the denial and note permission. 237

If the Court please: The defendant offers in evidence the original application for the reinstatement and the issuance of this policy in suit, signed by Mr. Mahar in the presence of Donald H. Grant, and also

the medical examiner's report, which is a report of
238 and attached to this application, and which was testified to by Doctor Augustine. This was submitted to them before we let the doctor go yesterday to identify him.

Mr. Bockes: We do not dispute the signature of James P. Mahar and we do not object to the introduction of this paper as a whole, but we do object to that part of the application which purports to allocate the thirteen dollars and ninety cents ($13.90) for certain specific purposes. We object to that part of it, on the ground that it does not appear to have been accepted by the government with that distribution of thirteen dollars ninety cents ($13.90).

239 Second: It does not appear that the applicant himself made those figures or knew of them or that six dollars and seventy cents ($6.70) was or could be locally applied upon his previous ten thousand dollar ($10,000) policy, which the applicant was seeking to reinstate.

Third: That that part of the application is inconsistent with the insurance policy itself afterward made and delivered has a final and complete statement of the contract between the plaintiff and the government.

240 Fourth: We object to the introduction of this unless it is accompanied by some stipulation as—a general stipulation of the government about the matter of three dollars thirty-five cents ($3.35) of this amount actually applied to the old War Risk Policy elapsed in 1919.

The Court: Does not that last mentioned show by one of the exhibits you introduced?

Mr. Bockes: We did not introduce it. We offered it. 241

The Court: The paper offered in January shows it was introduced. It shows the amount that was applied on the premium, which was within the three dollars and thirty-five cents, or whatever the figure that was submitted, does it not?

Mr. Bockes: I wonder if the counsel for the government will concede that.

Mr. Follett: That evidence was ruled out, was it not?

The Court: No. It went in with an exhibit without objection.

Mr. Tompkins: This is the paper your Honor refers to? 242

The Court: Yes.

Mr. Follett: We asked counsel for the government to furnish today the allocation of all payments and we would like to renew our motion that they produce.

Mr. Tompkins: If the Court please: We have a copy of the letter. I do not know the officer, it does not appear at the top of the letter, in which he states he is enclosing to the plaintiff a photostatic copy of the Bureau of Records.

I think that the government will be quite willing to introduce that entire letter, or copy, into evidence, if that is what you want us to do. 243

The Court: The objection to the application is overruled. The plaintiff may have an exception. The application is received.

If it is necessary to introduce other papers to clean

up any arguments about it, I will entreat the application and receive the other papers.

244

May I see that letter that you offered yesterday?

(Letter presented to Court.)

(Application for reinstatement received in evidence and marked Government's Exhibit Number 2.)

Mr. Tompkins: I have one witness here, your Honor.

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RAYMOND MATHIAS, called as a witness on behalf of the government and being duly sworn, testified as follows:

245

*Direct examination* by Mr. Tompkins:

Q. Mr. Mathias, where do you reside? A. Albany, New York.

Q. What is your position? A. Chief Clerk of the Personnel Department of the Delaware & Hudson Railroad.

Q. And have you with you the record of the employment of James P. Mahar of Oneonta in connection with your railroad? A. Yes, sir.

246

Q. And will you examine that report and tell us what you find as to his employment in the year of 1927? A. Our records show that Mr. Mahar was a car repairman, employed by the company at Oneonta, and that he was taken ill on October eighteenth, 1927, and died on December twenty-fourth, 1927. With the exception of that period,

the record does not indicate that he was absent on account of illness any other time.

247

Q. Does your record show anything about his pay? That record does not contain anything about his pay, whether he received full time or not? A. No. I don't have that particular record.

Q. And whether or not that your record shows that this is the only claim that Mr. Mahar ever made for illness while in your employ in recent years? A. That is the only claim he ever made.

Q. And your railroad carried a blanket insurance provision covering your employees from sickness and accident and death? A. Yes.

248

Q. And Mr. Mahar was covered with others, by that insurance? A. Yes.

Q. Do you have with you the records of anything about this insurance, does it show in your record anything beyond these claims before the fact that he made the claim? A. Our records show that he last worked October eighteenth, 1927, and was taken sick on the nineteenth of October, 1927, and that the statement of his doctor on this particular claim showing arterial jaundice.

Q. I suppose it also contains the record that he died and this insurance was paid? A. Yes, sir; it shows that he received the sum of one hundred and twenty-eight dollars, fifty-seven cents ($128.57) under this health claim covering benefits from the date of his illness to the date of his death.

249

Mr. Tompkins: That is all.

*Cross examination* by Mr. Bockes:

250 Q. Is there anything in your record to show that there was any black marks against him; in other words, anything against him during all the time he worked for the D. & H.? A. He was satisfactory, according to the record.

Q. Do you know from the record of the D. & H. Company if the man had a satisfactory record when taken sick?

Mr. Tompkins: I object to that.

The Court: Sustained.

Mr. Bockes: That is all.

251 Mr. Tompkins: I think that is all the witnesses we have. I don't know what you wish to do in regard to these papers. As far as I know, these are all the papers we can produce—whether they wish to put these in evidence or not.

The Court: I am going at this time to reverse the ruling made yesterday and allow in evidence, upon the plaintiff's motion, a letter which was offered, which bears date of March first, 1928, and was addressed to Mr. Frank C. Huntington, signed by an officer of the Veterans' Bureau. I am going to receive it for the sole purpose of showing the Government's admission as to the amounts of money received and the way they were applied, not for any other purpose. The defendant may have an exception.

252 Mr. Tompkins: Exception.

Mr. Follett: May we have an exception to that?

The Court: Yes.

Mr. Follett: That the letter does not purport to

cover any policy of the United States Government that has authority to bind itself.

253

The Court: That may be marked plaintiff's Exhibit No. 7.

(Letter dated March first, 1928, from United States Veterans' Bureau addressed to Mr. Frank C. Huntington, received in evidence and marked plaintiff's Exhibit No. 7.)

Mr. Follett: I offer in evidence certain photographic copies of records of the Government which are certified under the statute so as to make it admissable as originals. Do you want me to recite just what they are?

The Court: Probably, you had better.

254

Mr. Follett: One premium account card for the early renewal term insurance applied by the Veteran on November second, 1917.

Two: Premium account card for five-year convertible term insurance policy issued in July, 1927.

Receiving teller's register of the insurance premium receipt issued and identified as 9-2-1213, upon which is recorded the remittance of thirteen dollars, ninety cents ($13.90), which we are talking about.

Remittance listing sheet, identified as 7-2119, upon which the remittance of two dollars, ninety-five cents ($2.95) is shown.

255

Remittance listing sheet, identified by 6-2-5022, wherein is the record of three dollars and ninety-five cents ($3.95), received from the deceased.

Premium notice form returned by the decedent, receipted with the remittance of three dollars, ninety-five cents ($3.95), identified by 7-291.

Mr. Bockes: I object to the introduction of all
256 those exhibits, insofar as they bear the comments made by the Government, or its employees, upon them, with respect to such word as "marked in suspense" or otherwise, upon the grounds those comments are self-serving declarations never called to the attention of James P. Mahar and not binding upon his estate.

The Court: Overruled. I will receive the record. You may have an exception.

Mr. Bockes: Exception.

Mr. Tompkins: I want to call your Honor's attention to the fact that the first exhibit introduced yes-
257 terday on the cross-examination of Doctor Winsor, marked defendant's Exhibit 1, which is an application and examination in reference to the Railroad Company's insurance. I don't know whether your Honor looked at it or not, but I do want to call your attention. It may have a bearing on the certificate of Doctor Winsor accompanying this, stating when the disability began and as to what it was, "I expect the insured will be able to return to work about November ninth, 1927."

Mr. Follett: If the Court please, in addition to the exhibits which have just been introduced, the
258 Government would like to hand up to the Court a letter under date of October fifteenth, 1930, written by the United States Veterans' Bureau, the same officer whose letter you recently admitted in evidence over our objection, for the purpose solely to explain to the Court what the Government's contention is. We do not offer the letter in evidence as proof of any facts,

but we are offering for the purpose of making the record complete. 259

Mr. Bockes: I do not want to make a definite objection to that, because the same point is involved, but with the understanding that the same objections are made to the exhibit.

The Court: You have no objection because it is not offered as a fact?

Mr. Bockes: Yes.

The Court: Overruled. I will take the letter.

Mr. Bockes: Exception.

(Two premium account cards; receiving teller's register of the insurance premium receipt; two remittance listing sheets; premium notice form, received in evidence and marked Government's Exhibit Number 3.) 260

Mr. Tompkins: The defendant rests.

Mr. Bockes: Plaintiff rests and moves for a direction of a verdict for the full amount.

Mr. Follett: The defendant moves for nonsuit.

The Court: The motion is at this time denied and you have an exception.

Mr. Follett: And the defendant now moves for a direction of a verdict. 261

The Court: The plaintiff and the defendant both have moved for a direction of a verdict. The Court will take upon itself the decision of the question, without further consideration of the case by the jury. I will reserve for the time decision on the two motions for a direction of a verdict.

The jurors may be excused from further consideration of the case.

262

OPINION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, deceased,

*Plaintiff,*

against

263

UNITED STATES OF AMERICA,

*Defendant.*

Action on insurance policy.
Judgment for plaintiff.

APPEARANCES:

Frank C. Huntington, Esq., attorney for the plaintiff.

Hon. O. D. Burden, United States Attorney (B. Fitch Tompkins, Esq., Asst. U. S. Attorney); Joseph H. San, Esq., Insurance Attorney, and William A. Gillcrist, Esq., Asst. Insurance Attorney, of counsel.

264

Bryant, D. J.

This is an action to recover under a policy of insurance issued by the United States upon the life of James Patrick Mahar, now deceased.

Mahar was a World War veteran. He held a War Risk Term Insurance Policy for $10,000.00, which lapsed on August 31st, 1919, through failure to pay the premium due August 1st. In June, 1927, he applied for reinstatement of $5,000.00 of this insurance to be effective July 1, 1927. According to the requirements governing reinstatement, it was necessary for him to pay the premium on the $5,000.00 he desired reinstated for the lapsed month, viz. August, 1919, which was $3.95 and at least one month's premium on the converted policy, another $3.95. About July 1, 1927, Mahar made a remittance of $13.90. How this amount was determined upon, we do not know. It paid for the lapsed month and the months of July and August, 1927, and left $2.65 to apply on the $3.95 to become due September 1st. Under date of July 29th, the United States issued a receipt for this remittance, which contained the following clause:

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> "IMPORTANT.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924, and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insurance that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the above remittance will be returned to the depositor."

267

Manifestly, Mahar did not know at that time whether the requested insurance was effective or

ever would be. He heard nothing further until the
268 latter part of September, when he received the policy in suit, the usual Five Year Convertible Term Policy for $5,000.00. He was not advised how his remittance of $13.90 had been applied or would be applied and whether sufficient or insufficient. The policy shows that it was issued September 19, 1927. According to defendant's contention default had been made prior to that time.

There is not any dispute but that Mahar was in good health at the time he applied for reinstatement. In September he became sick, not to the extent of total disability, but to a degree which necessitated
269 his transfer to an easier position and which caused him to lose interest in business and life. October 17th he became totally incapacitated and on December 24th, 1927, he died, his death following an operation by a few hours.

On November 2nd and December 20th, remittances of $3.95 each were sent. These were retained by the United States and no acknowledgment or receipt was received until after the death of insured. After his death an undated receipt for the $3.95 containing the words "tendered in payment of the premium due
270 September 1, 1927," was received. Manifestly, this was a receipt for the $3.95 sent November 2, 1927, unless it is a receipt for a payment sent by insured which the records do not show. Certainly this receipt has no reference to the December 20th payment, for according to defendant's contention that was tendered in payment of the October premium.

The receipt contains the following:

| | |
|---|---|
| Premium thru Jan., 1928 | $19.75 |
| Received | 10.55 |
| Prem. bal. due | $ 9.20 |

271

Not taking into consideration the December 20th payment, which the receipt ignores, it is impossible to reconcile the figures with the statement of the purpose of the payment.

Claim for the insurance was made by plaintiff as administrator. It was refused upon the ground that the insurance lapsed for non-payment of premium due September 1, 1927, the grace period for the September period having expired midnight, October 2, 1927. No offer to return the $2.65 overpayment and the $7.90 paid in November and December, 1927, has been made.

272

If the defendant was a private insurance company, I would have no hesitancy in declaring it estopped from claiming the policy had lapsed for non-payment of premium. Under the facts in this case, it would be unconscionable to allow a private company to avoid its obligation on the ground of delayed premiums. The same principle should be applied against the defendant in this case. "When the United States went into the insurance business, issued policies in familiar form, and provided that, in the case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business." Standard Oil Co. v. United States, 267 U. S. 76. This policy is not one provided by a government for protection of its soldiers in time of danger. It is a policy issued pur-

273

suant to statute, whereby the Government in consideration of military service rendered and payment of
274 premiums assumed obligations as an insurer. State Bank & Trust Co. v. U. S., 16 Fed (2d) 439.

Having elected to become an insurer and to cast aside its immunity from suit, the Government must have its liabilities or rights as an insurer determined by the same rules as any other insurer and by the same course of reasoning as is applied by the Court in reaching a decision in a like case between private parties.

Plaintiff is entitled to judgment.

Dated January 10, 1933.

275

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### UNITED STATES DISTRICT COURT
### NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

against

276 THE UNITED STATES OF AMERICA,

*Defendant.*

LAW No. 1389

The above cause was regularly on the calendar and brought on for trial at the May Term, 1932, of Court at Syracuse, N. Y., before me and a jury and after

hearing the testimony offered on behalf of the parties herein and the arguments of the respective counsel, and the plaintiff and the defendant each having 277 moved for a directed verdict in its favor and the issues having thereby been withdrawn from consideration by the jury, and after due deliberation had thereon, I hereby make the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. That on or about January 18th, 1928, the plaintiff, The Wilber National Bank of Oneonta, N. Y., was duly appointed administrator of the estate of James Patrick Mahar by the Surrogate of Otsego County, New York, and at the time of trial hereof 278 was duly acting as such.

2. That heretofore and prior to the commencement of this action James Patrick Mahar resided in the City of Oneonta, Otsego County, New York.

3. That on or about June 25th, 1917, at Albany, New York, James Patrick Mahar enlisted for military service in the United States Army and was honorably discharged therefrom on or about April 3rd, 1919.

4. That during his said period of military service the defendant issued to James Patrick Mahar a contract of War Risk Insurance for $10,000, which 279 lapsed on August 31, 1919, for non-payment of premiums due thereon August 1, 1919.

5. That in June, 1927, and prior to July 1, 1927, James Patrick Mahar made an application for a United States Government Life Insurance Policy in the amount of $5,000, and at such times mailed with

his said application his check $13.90 to the order
280 of the Treasurer of the United States and that the said Treasurer of the United States cashed the said check on August 8, 1927.

6. That on or about September 19, 1927, the United States Government issued to James Patrick Mahar a Five Year Convertible Term Life Insurance Policy in the amount of $5,000, and the said policy contained a provision whereby the payment of premiums was waived in the event the insured became permanently and totally disabled.

7. That there is no evidence but that at the time of making such application James Patrick Mahar was in good health.

281 8. That in September, 1927, the said Mahar became sick, not to the extent of total disability but to a degree which necessitated his transfer to an easier position and which caused him to lose interest in business and in all his affairs.

9. That by the 17th of October, 1927, James Patrick Mahar had become permanently and totally disabled and so continued up to the time of his death.

10. That on or about December 24, 1927, James Patrick Mahar died in the City of Oneonta, County of Otsego, State of New York.

282 11. That on November 2, 1927, and on December 20, 1927, Helen Mahar, on behalf of her husband, James Patrick Mahar, mailed to the Treasurer of the United States, money orders each in the amount of $3.95 for payment of the monthly premium provided for in the said policy.

12. That on or about July 29, 1927, the United States Government acknowledged receipt of the

check for $13.90, but did not at that time nor at any time until subsequent to Mahar's death give any notice to Mahar or his family as to the way in which this payment was applied nor did the United States give to Mahar or his family any notice of the way in which it had applied the two payments of $3.95 made in November and December, 1927, until subsequent to his death. 283

13. That subsequent to the death of James Patrick Mahar, his widow received from the United States Government an undated receipt for the sum of $3.95 containing the words "tendered in payment of the premium due September 1, 1927."

14. That said receipt contains the following language written in with a pen: 284

"Premium thru Jan., 1928 ..... $19.75
Received ..... 10.55

Prem. balance due ..... $ 9.20"

15. That the written memorandum set forth in finding "14" includes the payment made November 2nd and December 20, 1927, and is the first itemized statement showing premiums due and unpaid on this policy; this statement was not received until some time in January, 1928, the insured having died December 24, 1927.

16. That the intention of James Patrick Mahar to secure insurance is clear. 285

17. That the Government did not until after the death of the said James Patrick Mahar send any notice to Mahar or his family that any premium or premiums were due or that the said policy had lapsed or was likely to lapse or that the payment of $13.90

had not been entirely applied to the payment of premiums on the said $5,000 life insurance policy, other than contained in the policy, itself, received on or about September 20, 1927.

18. That the Government in addition to retaining the original $13.90 has retained the said two payments of $3.95 and made no offer during Mahar's lifetime to return the said payments.

19. That the said receipt issued by the United States Government for the said payment of $13.90, dated on or about July 29, 1927, expressly stated that the Government did not at that time obligate itself to issue the policy applied for or any policy.

20. That at and prior to the commencement of this action a disagreement existed between the plaintiff and defendant as required by law.

CONCLUSIONS OF LAW

1. That this court has jurisdiction of the parties to and of this cause of action.

2. That the United States went into the insurance business, issued policies in familiar form and it must be assumed thereby to have accepted the ordinary incidents of suits in such business.

3. That the United States Government engaged in the life insurance business in competition with private insurance corporations and thereby became obligated to the same rules as to sending notices and applying premiums and obeying customs, applicable to private insurance corporations, and has failed to give notice and keep the insured informed as required by fairness, equity and law.

4. That by its failure to explain its allocation of moneys paid, failure to give notice respecting future

premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of alleged lapse.

5. That the plaintiff is entitled to judgment for $5,000.

Dated May 16, 1933.

FREDERICK H. BRYANT,
Judge of the United States District Court
for the Northern District of New York.

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292 PROPOSED FINDINGS OF DEFENDANT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

against

THE UNITED STATES OF AMERICA,

*Defendant.*

293 LAW No. 1389

The defendant asks the Court to find in the above case the following facts:

1. That on or about January 18th, 1928, the plaintiff, Wilber National Bank of Oneonta, N. Y., was duly appointed administrator of the estate of James Patrick Mahar by the Surrogate of Otsego County, New York, and at the time of trial hereof was duly acting as such.

*Found.*

294 2. That heretofore and prior to the commencement of this action James Patrick Mahar resided in the city of Oneonta, Otsego County, New York.

*Found.*

3. That on or about June 25th, 1917, at Albany, New York, James Patrick Mahar enlisted for military service in the United States Army and was

honorably discharged therefrom on or about April 3d, 1919.

*Found.*

295

4. That during his said period of military service the defendant issued to James Patrick Mahar a policy of War Risk Insurance for $10,000 which lapsed for non-payment of premiums due thereon July 1, 1919.

*Found.*

5. That in July, 1927, James Patrick Mahar caused to be reinstated and the defendant did reinstate the said War Risk Insurance policy to the extent and in the amount of $5,000.00 by paying under the regulations duly made one monthly premium of $3.35 for $5,000.00, one-half of the original lapsed contract amount, and the said James Patrick Mahar thereupon converted the said reinstated policy of insurance into a United States Government Life Insurance policy on the Five Year Convertible Term Plan which was issued effective July 1, 1927, in the amount of $5,000.00 and payable to the estate of said insured.

296

*Found in part. Certain parts refused in wording requested.*

297

6. That at the time of the reinstatement and conversion of said $5,000.00 insurance, said James Patrick Mahar paid the premiums due on said converted insurance policy for the months of July and August, 1927, and which policy provided for monthly premiums of $3.95 to be paid by insured the 1st day of

each calendar month, and, at option, quarterly, semi-
298 annually, and annual premiums.

*Partly found. Partly refused because wording does not show true facts.*

7. That other than the premiums due on said reinstated and converted policy of insurance for the months of July and August, 1927, the said James Patrick Mahar paid no other or further premiums thereon prior to Nov. 2, 1927, although the said policy of insurance provided for the payment of monthly premiums thereon, except that he had made an overpayment in June, 1927, in the amount of $2.65, which
299 was retained by the defendant.

*Found.*

8. That the said policy of insurance lapsed and came to an end for non-payment of premiums on August 31, 1927.

*Refused.*

9. That the said James Patrick Mahar died on or about December 24th, 1927, in the city of Oneonta, Otsego County, New York.

*Found.*

10. That the said James Patrick Mahar was not
300 permanently and totally disabled during the months of July, August and September, 1927, nor prior to October 17, 1927.

*Found.*

11. That at and prior to the commencement of this action a disagreement existed between the plaintiff and defendant as required by law.

*Found.*

12. That at the time of the commencement of this action said reinstated and converted policy of insurance was not in force and effect and no payments thereunder were due the plaintiff, and the following

301

*Refused.*

## CONCLUSIONS OF LAW

1. That this court has jurisdiction of the parties to and of this cause of action.

*Found.*

2. That at the time of the commencement of this action the contract of insurance therein sued upon and set forth in the complaint herein had lapsed for non-payment of the premiums due thereon from the plaintiff's intestate, the said James Patrick Mahar, and had terminated and come to an end.

302

*Refused.*

3. That plaintiff's intestate, the said James Patrick Mahar, was not and did not become permanently and totally disabled at any time while the said converted policy of insurance was in force and effect.

*Refused.*

4. That plaintiff's complaint should be dismissed with costs.

303

*Refused.*

Dated, May 2, 1933.

OLIVER D. BURDEN,
United States District Attorney.

## DEFENDANT'S EXCEPTIONS

304

## UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff*,

against

THE UNITED STATES OF AMERICA,

*Defendant*.

305

LAW No. 1389

The defendant files the following exceptions to the findings of fact and conclusions of law, and judgment, made by the Court herein filed May 22nd, 1933, viz:

First. Defendant excepts to that part of the Sixth finding of fact wherein it is found that on or about September 19, 1927, the U. S. Government issued to James Patrick Mahar a Five Year Convertible Term Life Insurance policy in the amount of $5,000, whereas the evidence shows such policy was issued as of

306

July 1, 1927, as required by the statute, but was countersigned and forwarded to the plaintiff's intestate on or about said date of September 19, 1927.

Second. Defendant excepts to the Second, Third, Fourth and Fifth conclusions of law, as not founded upon the evidence and facts found, and contrary to the law.

Third. Defendant also excepts to the failure and refusal of the Court to make the following findings proposed by the defendant and afterwards filed with the Clerk of this court, May 27th, 1933, viz: 807

That in July, 1927, James Patrick Mahar caused to be reinstated and the defendant did reinstate the said War Risk Insurance policy to the extent and in the amount of $5,000.00 by paying under the regulations duly made one monthly premium of $3.35 for $5,000.00, one-half of the original lapsed contract amount, and the said James Patrick Mahar thereupon converted the said reinstated policy of insurance into a United States Government Life Insurance policy on the Five Year Convertible Term Plan which 808 was issued effective July 1, 1927, in the amount of $5,000.00 and payable to the estate of said insurance.

That at the time of the reinstatement and conversion of said $5,000.00 insurance, said James Patrick Mahar paid the premiums due on said converted insurance policy for the months of July and August, 1927, and which policy provided for monthly premiums of $3.95 to be paid by insured the 1st day of each calendar month, and, at option, quarterly, semi-annual, and annual premiums.

That the said policy of insurance lapsed and came to an end for non-payment of premiums on August 31, 1927. 809

That at the time of the commencement of this action said reinstated and converted policy of insurance was not in force and effect and no payments thereunder were due the plaintiff, all of which were fully sustained by the evidence.

Fourth. And excepts to the refusal of the Court

to make and find the following conclusions of law as
310 proposed by the defendant, and filed with the Clerk of this court, viz:

That at the time of the commencement of this action the contract of insurance therein sued upon and set forth in the complaint herein had lapsed for nonpayment of the premiums due thereon from the plaintiff's intestate, the said James Patrick Mahar, and had terminated and come to an end.

That plaintiff's intestate, the said James Patrick Mahar, was not and did not become permanently and totally disabled at any time while the said converted policy of insurance was in force and effect.

That plaintiff's complaint should be dismissed with
311 costs, all of which were sustained by the law and proof herein.

Fifth. Defendant excepts to the making and entry of judgment herein in favor of the plaintiff filed May 22, 1933.

Dated, June 2, 1933.

OLIVER D. BURDEN,
U. S. Attorney in and for the
N. D. of N. Y.,
Attorney for Defendant,
Office and Post Office Address,
312 Federal Bldg., Syracuse, N. Y.

## PLAINTIFF'S EXCEPTIONS

## UNITED STATES DISTRICT COURT

## NORTHERN DISTRICT OF NEW YORK

313

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

against

THE UNITED STATES OF AMERICA,

*Defendant.*

314

LAW No. 1389

The plaintiff files the following exceptions to the Findings of Fact proposed by the defendant and filed with the Clerk of this court May 27, 1933, viz:

I. Defendant excepts to the Findings of Fact numbered "7" and "10".

Dated June 19, 1933.

FRANK C. HUNTINGTON,
Attorney for Plaintiff,
Office and P. O. Address,
241 Main Street,
Oneonta, New York.

315

JUDGMENT

316 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff*,

against

THE UNITED STATES OF AMERICA,

*Defendant*.

317 LAW NO. 1389

The above case coming on for hearing on the merits at the regular May term of this court, duly held by Hon. Frederick H. Bryant, the District Judge, and a jury, at the court rooms in the postoffice at Syracuse, New York, May 9, 1932, and the proofs having been submitted at the close of which both plaintiff and defendant moved for a directed verdict; and the jury having been thereupon discharged and the case having been thereupon duly submitted for determination by the Court;

318 And the Hon. Oliver D. Burden appearing for and on behalf of the United States; Mr. B. Fitch Tompkins, Esq., Assistant United States Attorney, and Joseph H. San, Esq., Insurance Attorney;

And the plaintiff having appeared by Frank C. Huntington, of Oneonta, N. Y., its attorney, with George L. Bockes and Sterling P. Harrington of Oneonta, N. Y., of counsel;

And the witnesses on the part of the plaintiff and the defendant having been duly sworn and examined and the parties hereto having produced, offered in 319
evidence, and given their other documentary evidence affecting the issues herein;

And counsel for the parties having been heard on oral argument and having submitted their briefs to the Court;

And due deliberation having been had thereon and the Court having handed down its decision, in writing, dated January 10, 1933, rendering judgment in favor of the plaintiff and against the defendant, and the Court thereafter having duly made its Findings of Facts and Conclusions of Law on May 16, 1933, wherein and whereby judgment for the plaintiff and 320
against the defendant was therein directed; now, it is

Ordered, Adjudged and Decreed that the plaintiff recover from the defendant, the United States of America, the sum of five thousand dollars ($5,000) damages, the same being insurance money due and payable, under and pursuant to the terms and conditions of the Government Life Insurance Policy No. K812772, herein sued upon; and it is further

Ordered, Adjudged and Decreed that the defendant, the United States of America, deduct ten per cent (10%) of the amount of insurance money, now 321
due and payable to the plaintiff under the terms of this judgment and the said insurance policy here sued upon, and pay the same to Frank C. Huntington, 241 Main Street, Oneonta, N. Y., attorney for the plaintiff, said amount to be paid by the United States Veterans Bureau to Frank C. Huntington out of payments to be made to the Wilber National Bank

of Oneonta, N. Y., administrator of the estate of
322 James Patrick Mahar, deceased, as and for counsel fee allowed herein, pursuant to Section 551 of Title 38, U. S. Code.

Dated Malone, N. Y., May 16, 1933.

(Signed) FREDERICK H. BRYANT,
District Judge.

## PETITION, ASSIGNMENT OF ERRORS AND ORDER ALLOWING APPEAL

### PETITION

323 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
*Plaintiff*,

against

THE UNITED STATES OF AMERICA,
*Defendant*.

324

LAW No. 1389

To the Honorable Frank Cooper,
Judge of the U. S. District Court for the Northern District of New York:

The United States of America, the defendant herein, by Oliver D. Burden, United States Attorney for

the Northern District of New York, feeling aggrieved by the judgment rendered herein, and entered in this court May 23, 1933, in favor of the plaintiff and against this defendant, and as directed by the United States Attorney General, hereby prays that it be permitted to appeal from the above judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors herewith presented. 325

Dated, Syracuse, N. Y., August 17, 1933.

UNITED STATES OF AMERICA,
By OLIVER D. BURDEN,
U. S. Attorney for the Northern
Judicial District of New York. 326

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## ASSIGNMENT OF ERRORS

## UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
*Plaintiff*,
against
THE UNITED STATES OF AMERICA,
*Defendant*. 327

LAW No. 1389

The United States of America, the defendant in the above entitled cause, files the following Assign-

328 ment of Errors upon which it will rely in the prosecution of the appeal herein petitioned for in said cause from the judgment of this court entered on the 23rd day of May, 1933.

THE COURT HEREIN ERRED:

1. In not granting the motion of the defendant at the close of the plaintiff's case for dismissal of the complaint on the ground that the plaintiff had failed to prove a cause of action herein.

2. In not granting the motion of the defendant for nonsuit and dismissal of the complaint at the close of the testimony in the action on the ground
329 that the plaintiff had failed to prove a cause of action herein.

3. In not granting the motion of the defendant made at the close of the testimony in directing a verdict for the defendant herein.

4. In finding as a fact that the contract of insurance herein was issued on or about September 19, 1927.

5. In making the following Conclusions of Law:

(a) That the United States went into the insurance business, issued policies in familiar form and it must be assumed thereby to have accepted the ordi-
330 nary incidents of suits in such business.

(b) That the United States Government engaged in the life insurance business in competition with private insurance corporations and thereby became obligated to the same rules as to sending notices and applying premiums and obeying customs applicable to private insurance corporations, and has failed to

give notice and keep the insured informed as required by fairness, equity and law. 331

(c) That by its failure to explain its allocation of moneys paid, failure to give notice respecting future premiums, failure to return premiums and funds for many months after it now claims the policy had lapsed, and general failure to provide necessary information and explanation to the insured, the defendant has estopped itself from withholding payment because of alleged lapse.

(d) That the plaintiff is entitled to judgment for $5,000.

6. In refusing to find that, as shown by the evidence, in July, 1927, James Patrick Mahar caused to 332
be reinstated and the defendant did reinstate the said War Risk Insurance policy to the extent and in the amount of $5,000.00 by paying under the regulations duly made one monthly premium of $3.85 for $5,000.00, one-half of the original lapsed contract amount, and the said James Patrick Mahar thereupon converted the said reinstated policy of insurance into a United States Government Life Insurance policy on the Five Year Convertible Term Plan which was issued effective July 1, 1927, in the amount of $5,000.00 and payable to the estate of said insured.

7. In refusing to find that, as shown by the evidence, that at the time of the reinstatement and conversion of said $5,000.00 insurance, said James Patrick Mahar paid the premiums due on said converted insurance policy for the months of July and August, 1927, and which policy provided for monthly pre-

334 miums of $3.95 to be paid by insured the 1st day of each calendar month, and, at option, quarterly, semi-annual, and annual premiums.

8. The Court erred in refusing to find as requested by the defendant

(a) That said policy of insurance lapsed and came to an end for non-payment of premiums on August 31, 1927.

(b) That at the time of the commencement of this action said reinstated and converted policy of insurance was not in force and effect and no payments thereunder were due the plaintiff.

335

9. In refusing to find, as conclusions of law, as requested by the defendant,

(a) That at the time of the commencement of this action the contract of insurance therein sued upon and set forth in the complaint herein had lapsed for non-payment of the premiums due thereon from the plaintiff's intestate, the said James Patrick Mahar, and had terminated and come to an end.

(b) That plaintiff's intestate, the said James Patrick Mahar, was not and did not become permanently and totally disabled at any time while the said converted policy of insurance was in force and effect.

336

(c) That plaintiff's complaint should be dismissed with costs.

Wherefore, defendant prays that the said judgment may be reversed for such other and further relief as the Court may deem just and proper.

*Petition, assignment of errors and order allowing appeal*

Dated, August 17, 1933.

337

UNITED STATES OF AMERICA,
By OLIVER D. BURDEN,
U. S. Attorney for the Northern
District of New York,
Attorney for Defendant.

ORDER ALLOWING APPEAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

338

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
*Plaintiff,*
against
THE UNITED STATES OF AMERICA,
*Defendant.*

LAW No. 1389

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Upon reading and filing petition of the defendant for an appeal from the judgment entered on the 23rd day of May, 1933, in the above entitled cause, and upon consideration of the assignment of errors filed herein, it is

Ordered that the appeal herein be allowed as prayed for without defendant giving bond, and that a citation issue according to law, and it is

340 Further Ordered that a certified transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit.

Dated August 17, 1933.

FRANK COOPER,
United States District Judge.

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NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

341 THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
*Plaintiff*,

against

THE UNITED STATES OF AMERICA,
*Defendant.*

LAW No. 1389

342 Now comes the above named defendant, the United States of America, feeling itself aggrieved by the decision of the Court, which was entered in the Clerk's office of this court on the 23d day of May, 1933, and does hereby appeal from said decision and final judgment of the Court aforesaid in favor of the plaintiff to the U. S. Circuit Court of Appeals for the Second Judicial Circuit, and prays that a citation issue as provided by law requiring that a transcript of the

record and proceedings on which said decision and final judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that the above named plaintiff show cause, if any, why the aforesaid provisions of final judgment made and entered against said defendant may not be corrected and reversed and why speedy justice should not be done to the parties in that behalf, and for such other and further relief as may be just and proper. 343

Dated, August 17, 1933.

OLIVER D. BURDEN,
U. S. Attorney for the N. D. of N. Y.,
Attorney for Defendant,
Office and P. O. Address,
Federal Building, Syracuse, N. Y. 344

To—
Frank C. Huntington, Esq.,
Attorney at Law,
Wilber National Bank Bldg.,
Oneonta, N. Y.
Hon. John W. Hahn,
Clerk, U. S. District Court,
Federal Building, Utica, N. Y. 345

## CITATION

346 THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA, }
Second Judical Circuit. } ss.

To: The Wilber National Bank of Oneonta, N. Y., as Administrator of the Estate of James Patrick Mahar, deceased,

Greeting:

347 You are hereby cited and admonished to be and appear in the U. S. Circuit Court of Appeals for the Second Circuit at the City of New York, State of New York, within thirty days from the date hereof pursuant to an order allowing said appeal from the District Court of the United States for the Northern Judicial District of New York, in a suit wherein the United States of America is appellant and you are the appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done to parties in that behalf.

348 Witness, the Honorable Frank Cooper, District Judge of the United States, at Albany, New York, within said Circuit, this 17th day of August, in the year of our Lord one thousand nine hundred and thirty-three.

FRANK COOPER,
United States District Judge.

Attest:

JOHN W. HAHN, Clerk,
By G. A. PORTER, Deputy Clerk.

849

Due, timely and personal service of the above citation and copies of notice of appeal, assignment of errors, petition and order allowing appeal, is hereby admitted.

Dated, August 29, 1933.

FRANK C. HUNTINGTON,
Attorney for The Wilber National Bank of Oneonta, N. Y.,
Appellee.

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## EXHIBITS

### PLAINTIFF'S EXHIBIT 1

352

### THE UNITED STATES OF AMERICA

Government Life Insurance

Policy No. K812772
Amount $5000
Name
James Patrick Mahar

### NOTICE

It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm, or corporation in collecting the insurance under this policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the United States Veterans Bureau, Washington, D. C.

353

Five Year Convertible Term Policy

745—2-14051—Government Printing Office

| | | |
|---|---|---|
| Age of Insured 37 | Monthly | $ 3.95 |
| | Quarterly | 11.80 |
| | Semiannual | 23.55 |
| | Annual | 46.65 |

### THE UNITED STATES OF AMERICA

Hereby Grants Insurance

Amount of Insurance of five thousand ($5000) Dollars

To

354 Insured Premium James Patrick Mahar (the Insured).

This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of $3.95 on the 1st day of each month for a period of sixty (60) months and thereafter the monthly premium of $10.80 on the 1st day of each succeeding month during the lifetime

of the Insured except as hereinafter provided. Receipt of the first premium is hereby acknowledged.

Mode of Payment at Death or Disability

This insurance is payable in monthly installments of $28.75 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured this insurance is payable in accordance with the Optional Settlement so selected.

Beneficiary

This insurance, subject to the beneficiary provisions hereof, is payable to the estate of the Insured, no beneficiary within the permitted class having been designated, hereinafter called the beneficiary, in one sum.

Disability Benefits to Insured

Upon due proof of the total permanent disability of the Insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability so long as he lives, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

Death Benefits to Beneficiary

Upon due proof of the death of the Insured while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any paid to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two hundred and forty or

more installments shall have been paid to the Insured on account of total permanent disability, no
358 death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability payments.

Place of Payment

All payments under this policy shall be payable at the United States Treasury in the City of Washington, District of Columbia.

Dividends

This insurance shall participate in dividends from gains and savings.

Conditions

The conditions, benefits, and privileges recited on the succeeding pages hereof constitute a part of this
359 contract.

This policy takes effect on the 1st day of July, nineteen hundred and twenty-seven.

FRANK T. HINES, Director,
United States Veterans' Bureau.

Countersigned at Washington, D. C.
Examined and issued September 19, 1927.

M. J. MOORE, Registrar.

745—2-14051 8A

CONDITIONS, BENEFITS, AND PRIVILEGES

Payment of Premiums

360 1. Premiums are due and payable monthly in advance in legal tender of the United States of America to the Treasurer of the United States in the City of Washington, District of Columbia.

(a) Premiums may be paid annually, semiannually, or quarterly, in advance, in which case the premium payable will be the sum of the monthly premiums for the period discounted at three and one-

half per centum per annum. The discounted premiums for these periods are stated on the first page hereof. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, if living; otherwise to the beneficiary. 361

(b) If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

Grace for Payment of Premiums

2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable. 362

Reinstatement

3. This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy. 363

Dividends

4. This policy shall participate in and receive such dividends from gains and savings as may be

determined by the Director of the United States Veterans Bureau. Any dividends so apportioned may
364 be taken in cash, and if not so taken, shall be left on deposit to accumulate at such rate of interest as the Director of the United States Veterans Bureau may determine, but at a rate never less than three and one-half per centum compounded and credited annually, and payable, if not previously withdrawn, at the maturity of this policy to the person entitled to its proceeds.

Nonforfeiture Provisions

5. Cash value, paid-up insurance, extended insurance, and policy loan provisions as follows shall be effective at any time after the completion of the sixth policy year, all values, reserves, and net single
365 premiums being based on the American Experience Table of Mortality, with interest at the rate of three and one-half per centum per annum.

Cash Value

(a) The cash value at the end of the sixth policy year and at the end of any policy year thereafter, for which premiums have been paid in full, shall be the reserve, together with any dividend accumulations. For each month after the sixth policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year. Upon written request therefor and upon complete surrender of this policy
366 with all claims thereunder, made by the Insured while this policy is in force, but not later than three calendar months from the due date of the premium in default, the United States will pay to the insured the cash value hereof less any indebtedness.

Paid-up Insurance

(b) If the policy has not been surrendered for

cash, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the United States will issue paid-up insurance for such amount as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the Insured. The paid-up insurance shall be with right to total and permanent disability benefits and with right to dividends. The number of monthly installments payable upon due proof of total and permanent disability or death of the Insured under such paid-up insurance will be the same as would then be payable under this policy. The Insured may at any time surrender the paid-up policy for its cash value, or obtain a loan on such paid-up insurance. 367 368

Extended Insurance

(c) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for cash or for paid-up insurance, this policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy, less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the Insured. The extended insurance shall be with right to total and permanent disability benefits and with right to dividends payable in cash only. The number of monthly installments payable upon due proof of total and permanent disability or death of the Insured under such extended insurance will be the same as would then be payable under this policy. The extended insurance shall not have a loan value, but shall have a cash value. 369

Policy Loans

370 (d) At any time after the expiration of the sixth policy year and before default in payment of any subsequent premium, and upon execution of a loan agreement satisfactory to the Director, the United States will lend to the Insured on the sole security of this policy any amount which shall not exceed ninety-four per centum of the cash value, and any indebtedness shall be deducted from the amount advanced on such loan. The loan shall bear interest at a rate not to exceed six per centum per annum, payable annually, and at any time before default in payment of premium the loan may be repaid in full or in amounts of five dollars or any multiple thereof. Failure to pay either the amount of the loan or the interest thereon shall not avoid this policy unless 371 the total indebtedness shall equal or exceed the cash value thereof. When the amount of the indebtedness equals or exceeds the cash value this policy shall cease and become void.

372

## 6. TABLE OF GUARANTEED SURRENDER VALUES

| End of Policy Year | Cash-surrender Value for Each $1,000 of Insurance (Full reserve of policy) | Paid-up Insurance with Disability Benefits for Each $1,000 of Insurance | Extended Insurance with Disability Benefits | |
|---|---|---|---|---|
| | | | Years | Days |
| 6 | $ 16.06 | $ 36.77 | 1 | 215 |
| 7 | 32.60 | 73.05 | 3 | 59 |
| 8 | 49.59 | 108.75 | 4 | 244 |
| 9 | 67.06 | 143.91 | 6 | 21 |
| 10 | 84.98 | 178.43 | 7 | 109 |
| 11 | 103.34 | 212.30 | 8 | 140 |
| 12 | 122.12 | 245.46 | 9 | 115 |
| 13 | 141.29 | 277.86 | 10 | 37 |
| 14 | 160.82 | 309.47 | 10 | 275 |
| 15 | 180.68 | 340.24 | 11 | 105 |
| 16 | 200.86 | 370.19 | 11 | 262 |
| 17 | 221.32 | 399.28 | 12 | 20 |
| 18 | 242.02 | 427.48 | 12 | 111 |
| 19 | 262.96 | 454.85 | 12 | 177 |
| 20 | 284.07 | 481.30 | 12 | 219 |
| 21 | 305.34 | 506.88 | 12 | 242 |
| 22 | 326.73 | 531.59 | 12 | 246 |
| 23 | 348.20 | 555.41 | 12 | 235 |
| 24 | 369.72 | 578.37 | 12 | 212 |
| 25 | 391.22 | 600.45 | 12 | 177 |
| 30 | 497.24 | 698.15 | 11 | 258 |
| 35 | 596.50 | 775.64 | 10 | 175 |

(a) The above values are based on an insurance of $1,000 without indebtedness, and with no dividends standing to the credit of the policy, and no installments having been paid on account of total permanent disability. If this policy provides for a larger amount of insurance than $1,000, the cash value, loan values, and paid-up insurance values will be increased proportionately. The periods of extended insurance as given in the above table are the same irrespective of the amount of the insurance.

Values—First Five Years

7. After this policy has been in force by the payment of premiums for twelve months and before the
376 expiration of the five-year term period, the reserve, if any, together with any dividend accumulations less any indebtedness, may be paid to the insured in cash or used to purchase paid-up term insurance for the unexpired portion of the five-year term period, provided the insured makes written request therefor and surrenders this policy before the expiration of the grace period. If the Insured does not make written request and surrender of the policy before the expiration of the grace period, then the reserve, if any, plus any dividend accumulations, less any indebtedness, will be used as a net single premium to purchase extended term insurance from the due date of the premium in default, but not to extend beyond
377 the termination of the five-year term period. All calculations will be made as provided in paragraphs 5, 5 (a), 5 (b), and 5 (c) of this policy.

Indebtedness at Maturity of Policy

8. At the maturity of this policy by total permanent disability or death, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall be payable in one sum at death, any indebtedness shall be deducted from the amount pay-
378 able under the policy.

Incontestability

9. This policy shall be incontestable after the insurance has been in force for six months from the date of issuance or reinstatement, except for fraud or non-payment of premiums, and the policy is issued free of restrictions as to travel, residence, occupation, or military or naval service. However, no

insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: *Provided,* That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to the estate of the Insured. 379

**Misstatement of Age**

10. If the age of the Insured has been understated, the amount of the insurance payable under the policy shall be such exact amount as the premium paid would have purchased at the correct age; if overstated, the excess of premiums paid shall be refunded without interest. Guaranteed surrender and loan values will be modified accordingly. The age of the Insured will be admitted by the United States Veterans Bureau at any time upon satisfactory proof. 380

**Total Permanent Disability**

11. Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest. 381

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one

hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

382

Recovery From Disability

12. Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Director of the United States Veterans Bureau of the continuance of such total permanent disability, and if the Insured shall fail to furnish such proof, all payments of monthly installments on account of such total permanent disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter the premium to be paid, and the cash values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance values shall be modified accordingly.

383

384

Total Permanent Disability Benefits
Under Paid-up Insurance

13. If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid to the beneficiary upon the surrender of this policy at

the death of the Insured the remaining unpaid installments (two hundred and forty less the number paid). If an optional settlement has been selected, payment shall be made accordingly. 385

Total Permanent Disability Benefits
During Period of Extended Insurance

14. In case total permanent disability occurs during the period of extended insurance and payments are made on account of such disability and recovery from such disability also takes place, then (a) if the recovery takes place before the end of the period of extended insurance, the insurance shall be reduced accordingly, and the insurance, as reduced, shall be continued in force; (b) if the recovery takes place after the end of the period of extended insurance, all rights and claims hereunder shall cease, except as to the privilege to reinstate. 386

Assignment

15. The proceeds of this policy shall not be assignable, except that any person to whom this insurance shall be payable may assign his interest in this insurance to any other beneficiary within the class permitted by the World War Veterans' Act or any amendment or supplement thereto. No such assignment of this policy shall be binding upon the United States unless in writing and until filed in the United States Veterans Bureau, Washington, D. C. The United States assumes no responsibility for the validity of any assignment. The proceeds of this policy shall not be subject to the claims of creditors of the Insured or creditors of any beneficiary to whom the proceeds may be awarded, except claims of the United States arising under the War Risk Insurance Act or the World War Veterans' Act. 387

Exempt From Taxation

388 16. The proceeds of this policy are exempt from all taxation.

Beneficiary

17. The insured shall have the right at any time, and from time to time, and without the consent or knowledge of the beneficiary, to change the beneficiary under this policy within the class of beneficiaries permitted by the World War Veterans' Act or any amendment or supplement thereto. A change of beneficiary must be made by written notice to the United States Veterans Bureau over the signature of the Insured and shall not be binding on the Bureau unless received and indorsed on the policy by
389 the Bureau. A change of beneficiary must be forwarded to the Bureau by the Insured or his agent, and must be accompanied by the policy. A change of beneficiary may be indorsed during the lifetime of the Insured or after his death, and when so indorsed said change shall be effective as of the date the insured signed the written notice of change of beneficiary. The Bureau shall be protected in all payments made to the beneficiary last of record and before receipt of notice of a change of beneficiary, and no payments so made shall be paid again to the changed beneficiary. The Insured may exercise any right or privilege given under the provisions of this policy without the consent of the beneficiary. An original
390 designation of a beneficiary may be made by the last will and testament, but no change of beneficiary may be made by last will and testament.

(a) If no beneficiary within the permitted class be designated by the Insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the Insured, then there shall be paid to the estate of the Insured the present value of the remaining unpaid monthly installments.

(b) If the designated beneficiary survives the Insured and dies before receiving all the installments payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments. 391

(c) Where a beneficiary at the time of designation by the insured is within the permitted class of beneciaries and is the designated beneficiary at the time of the maturity of the insurance because of the death of the Insured, such beneficiary shall be deemed to be within the permitted class even though the status of such beneficiary shall have been changed.

Change to Other Forms

18. This policy may be exchanged for a policy of the same amount, bearing the same date and based on the same age, on any plan of insurance issued by the United States Veterans Bureau at a higher rate of premium, upon payment of the difference in reserve on this policy and the reserve on the new policy. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof. 392

(a) This policy may be exchanged for a policy of the same amount on any plan of insurance issued by the United States Veterans Bureau at a higher rate of premium, upon payment of the current monthly premium at the attained age of the insured for the plan of insurance selected. The reserve (if any) on this policy will be allowed as a credit on the current monthly premium. Such exchange will be made without medical examination upon complete surrender of this policy while in force and within five years from the effective date hereof. 393

Optional Settlement

19. The Insured may select one of the Optional

Settlements set forth below, but notice of the selection shall not be valid unless and until it is recorded
394 in the United States Veterans Bureau. The Insured may revoke his selection of the Optional Settlement but the revocation shall not be valid unless and until it is recorded in the United States Veterans Bureau. If the Insured does not select one of said Optional Settlements, then he shall be deemed to have made no election, and the insurance shall be payable in two hundred and forty monthly installments, unless an election under Option Two or Option Three is made by the beneficiary.

(a) If the Insured has not made an optional selection, a designated beneficiary or beneficiaries, at the maturity of this policy by death, may select settle-
395 ment under Options Two or Three as set forth below, but the selection shall not be valid unless and until it is recorded in the United States Veterans Bureau. If the Insured has made an optional selection, a designated beneficiary, at the maturity of this policy by death, may elect to receive such insurance in installments spread over a greater period of time than that selected by the Insured.

(b) Settlement under one of these options shall be considered full and complete settlement of all liability under this contract.

(c) The values shown in the following options are based on an insurance of $1,000 without indebted-
396 ness. If there is indebtedness under this policy, or the Insured has received any payments on account of total permanent disability, the value will be decreased accordingly. If this policy increased proportionately.

20. OPTIONAL SETTLEMENTS IN LIEU OF MONTHLY INSTALLMENTS OF $5.75 PAYABLE ON THE DEATH OF THE INSURED UNDER THE TERMS OF THIS POLICY, SUBJECT TO THE BENEFICIARY PROVISIONS HEREOF 397

OPTION ONE

Insurance Payable in One Sum.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, $1,000 will be payable in one sum at the maturity of this policy by death.

OPTION TWO

Insurance Payable in Elected Installments.—The installments noted below will be payable for an agreed number of months (not less than thirty-six) to the designated beneficiary, but if such beneficiary dies before the agreed number of monthly installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof.

OPTION THREE

Insurance Payable in Installments Throughout Life.—The installments noted below will be payable throughout the lifetime of the designated beneficiary, but if such designated beneficiary dies before two hundred and forty such installments have been paid, the remaining unpaid monthly installments will be payable in accordance with the beneficiary provisions hereof. 398 399

400

| Number of Monthly Installments | Amount of Each Monthly Installment | Age of Beneficiary at Time of Death of Insured | Amount of Each Monthly Installment |
|---|---|---|---|
| 36 | $29.19 | 10 | $3.67 |
| 48 | 22.27 | 15 | 3.75 |
| 60 | 18.12 | 20 | 3.84 |
| 72 | 15.35 | 25 | 3.96 |
| 84 | 13.38 | 30 | 4.11 |
| 96 | 11.90 | 35 | 4.30 |
| 108 | 10.75 | 40 | 4.52 |
| 120 | 9.83 | 45 | 4.79 |
| 132 | 9.09 | 50 | 5.07 |
| 144 | 8.46 | 55 | 5.35 |
| 156 | 7.94 | 60 | 5.56 |
| 168 | 7.49 | 65 | 5.70 |
| 180 | 7.10 | 70 | 5.75 |
| 192 | 6.76 | 75 | 5.75 |
| 204 | 6.47 | Amounts of monthly installments for other ages will be furnished upon request. | |
| 216 | 6.20 | | |
| 228 | 5.97 | | |
| 240 | 5.75 | | |

401

Authority

21. This insurance is granted under and subject to the provisions of the World War Veterans' Act, 1924, and amendments and supplements thereto. No person, except the Director of the United States Veterans Bureau may waive forfeitures, or make, modify, or discharge contracts, or extend the time for paying a premium, or bind the United States by making any promise respecting any benefits hereunder.

402

PLAINTIFF'S EXHIBIT 2

(Photo of check)


ONEONTA, N.Y. July - 1 - 192 7 No.

WILBER NATIONAL BANK
OF ONEONTA, N.Y.

50-242

Pay to the United States $13.80 DOLLARS

INSURANCE CASHIER

UNITED STATES VETERANS BUREAU

## PLAINTIFF'S EXHIBIT 3

406 PROVISIONAL RECEIPT

United States Veterans Bureau
Insurance Division
Washington, D. C.
United States Government Life Insurance
Unit Number 12 N
Form 773 (Revised Jan., 1927)

Receipt is hereby acknowledged of a remittance in connection with your application for conversion of Term Insurance into United States Government Life Insurance.

407 Date of Application, 7-1-27.
Amount of insurance applied for, 5000.
Plan of insurance applied for
Certificate number
Amount of remittance, 13.90 Ck.

James Patrick Mahar
4 East End Ave
Oneonta N Y

408 Important.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924, and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insurance that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the above remittance will be returned to the depositor.

Government Printing Office—2-9198

Stamped:—Payment received Jul 29 1927 A P Carson Insurance Cashier 409

PLAINTIFF'S EXHIBIT 4

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

(Seal)

Stamped:
Feb 2-1928 2:55 P. M.
1394
Apr 3-1919
Paid in full 80.00, Camp Upton, L. I. J. E. Adams, 1st Lt. Q. M. C. U. S. A. 410
Otsego County, ss. Recorded on the 2nd day of February 1928 at 2:55 P. M., in Liber 1 of Soldiers Disc. at page 495. Chester T. Backus, Clerk.

To all whom it may concern:

This is to certify, that *James P. Mahar, †1201260 Sergeant 1st Class, Co. A, 102 Engineers,
The United States Army, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of ‡Pursuant to authority contained in W. D. Circular 73 dated Nov. 18, 1918, and letter A. G. O. dated Nov. 19, 1918 (220.81 Camp Upton, N. Y., Misc. Div.). 411

Said James P. Mahar was born in Schobarie, in the State of New York. When enlisted he was 26 years of age and by occupation a R. R. Engr. He

had blue eyes, red hair, fair complexion, and was 5 feet 6 inches in height.

412 Given under my hand at Camp Upton, New York, this 3 day of April, one thousand nine hundred and nineteen.

W. S. Conrow,
Colonel Engineers,
Commanding.

Form No. 525, A. G. O., Oct. 9-18. 3-3164

*Insert name, Christian name first; e. g., "John Doe."

†Insert Army serial number, grade, company and regiment or arm or corps or department; e. g.,
413 "1,620,302"; "Corporal, Company A, 1st Infantry"; "Sergeant, Quartermaster Corps"; "Sergeant, First Class, Medical Department."

‡If discharged prior to expiration of service, give number, date, and source of order or full description of authority therefor.

(Reverse side)

ENLISTMENT RECORD

Name: James P. Mahar. Grade: Sergeant 1st Class.

Enlisted (or Inducted), June 26, 1917, at Albany,
414 New York.

Serving in First enlistment period at date of discharge.

Prior service: * None.

Noncommissioned officer: Sergeant, Sergeant 1st Class.

Marksmanship, gunner qualification or rating: †Not rated.

Horsemanship: Not rated.

Battles, engagements, skirmishes, expeditions: Guillemont Farm, Hindenberg Line, LaSelle River (St. Souplet), Jonc De Mer Ridge, St. Maurice River, East Poperinghe Line. 415

Knowledge of any vocation: Railroading.

Wounds received in service: None.

Physical condition when discharged: .....

Typhoid prophylaxis completed, Aug. 19, 1917.

Paratyphoid prophylaxis completed Oct. 10, 1917.

Married or single: Single.

Character: Excellent.

Remarks: Entitled to travel pay to Albany, N. Y. Served with American Expeditionary Forces in France, Belgium. Left U. S., May 17, 1918. Arrived in U. S., Feb. 28, 1919. Services honest and faithful. No A. W. O. L. under G. O. 45+90+A. W. 107. Entitled to $60 Bonus, auth. act. of 2/24/19 and Telegram W. D. 2/25/19. 416

Signature of soldier: James P. Mahar.

George Bates,
Capt. Engrs.,
Commanding Co. A, 102 Engrs.

Stamped: L. I. R. R. Apr. 3, '19. Camp Upton.

*Give company and regiment or corps or department, with inclusive dates of service in each enlistment. 417

†Give date of qualification or rating and number, date, and source of order announcing same.

## PLAINTIFF'S EXHIBIT 5

418 United States Veterans Bureau
Insurance Division
Washington, D. C.

United States Government Life Insurance

The Bureau is in receipt of your remittance of $3.95, tendered in payment of the premium due September 1, 1927.

James P. Mahar K-812772
4 East End Ave.
Oneonta, N. Y.

419 Your policy provides for a grace period of thirty-one days from the due date, during which time the premium may be paid without interest. Inasmuch as your remittance was not mailed until after the expiration of the grace period, it cannot be credited in payment of the premium until the insurance has been reinstated.

Application for reinstatement of your insurance may be made on the inclosed Form 744, provided it is completely filled in and mailed to the Bureau within three months from the due date of the premium mentioned above. If you have not already forwarded all
420 premiums in arrears, the application must be accompanied by a remittance sufficient to complete all premiums, including the current month, plus interest at the rate of 5% per annum from their respective due dates to the date on which application is submitted.

If reinstatement is delayed beyond the three months period, a report of a full medical examination

must be submitted with the application for reinstatement. It is to your advantage to reinstate immediately. 421

For the Director,
George E. Ijams,
Assistant Director.

Form 772
Incl. 744.
Government Printing Office 2-13872

| | |
|---|---|
| Premiums thru Jan., 1928 | $19.75 |
| Received | 10.55 |
| Prem. Bal. due | $ 9.20 |

422

United States Veterans Bureau
Insurance Division
Form 744—Revised May, 1924

Certificate No. T.....
Policy No. K 812772
Claim No. C.....

## APPLICATION FOR REINSTATEMENT OF INSURANCE

This form is to be used only where the applicant applies for the reinstatement of Term or Converted Insurance within three months from due date of the premium in default. If insurance has lapsed for a period longer than three months, application must be made on Form 742 for Term Insurance or Form 807 for Converted Insurance. 423

1. I, the undersigned, hereby apply for the reinstatement of $.....insurance granted to me

under Certificate No. T....., Policy No. K.....,
(Fill in only number applicable)

424 now lapsed on account of the nonpayment of the premium for the month of September, 1927, within the grace period of 31 days. As a condition to the reinstatement of this insurance, I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief, and are made as of the day on which this application is submitted to the Bureau or deposited in the United States mail.

2. Are you now in as good health as you were at the due date of the premium in default?

3. Are you now permanently and totally disabled? (Answer "Yes" or "No").

425 4. Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? (Answer "Yes" or "No.")..... If so, give dates and full particulars, including the name and address of physician .....

5. Have you ever made application for (a) Government Compensation?..... (b) Training allowance?..... If so, give Claim number C.....

426 6. I desire this reinstatement to be effective as indicated by check below (this provision applies to Term Insurance only):

☐ The first day of the month in which requirements have been complied with, or

☐ The first day of the following month.

Regulation 14 provides that TERM insurance shall

be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or, upon his written request made during such month, from the first day of the following month. 427

Signed .....on this

(City or town) (State)

.....day of....., 192

Witness: ..... .....

(Signature of Witness) (Signature of Applicant)

..... .....

(Address) (Address)

This application should be deposited in the United States mail immediately after execution. 428

Government Printing Office—2-11900

PLAINTIFF'S EXHIBIT 6

No. 71

Chas. E. Houghtaling, Publisher, Albany, N. Y.

A VERIFIED TRANSCRIPT FROM THE REGISTER OF DEATHS

Date of death, December 24, 1927. Register No. 208.

Name of deceased, James Patrick Mahar.

Age, 37 years, 3 months, 27 days. 429

Single, married, widowed or divorced, Married.

Color or race if other than white, White.

Occupation, Railway Car Inspector.

Birthplace, Schoharie, N. Y.

How long a resident—Here, 3 years. In U. S. if foreign.....

Father's name and birthplace, John Mahar, Schoharie, N. Y.

430 Mother's name and birthplace, Mary Mahar, Schoharie, N. Y.

Place of death, Parshall Private Hospital, Oneonta, N. Y.

Cause of death—Chief causes, Chronic cholecyetitis and cholangitis. Other causes, Pulmonary embolism.

Time from attack till death.....

Medical attendant, or other attestant, G. H. Brinkman, M.D.

Place of burial, Mt. Calvary Cem., Oneonta, N. Y.

Undertaker, W. F. Rothery.

481 I Hereby Solemnly Attest, that this is a true transcript from the Public Register of Deaths, as kept in the office of the City Clerk at Oneonta, County of Otsego, State of New York.

Dated at Oneonta, N. Y., the 18th day of April, 1932.

(Signed) W. A. Holley,

Official title, City Clerk and Registrar.

(Seal of the City of Oneonta, etc.)

432

PLAINTIFF'S EXHIBIT 7

(Seal—Veterans Bureau, 1921)

UNITED STATES VETERANS BUREAU
Washington

March 21, 1928.

This letter refers to your file number:
In reply refer to: FA B D—Mahar, James P.—XC-707 911.

Mr. Frank C. Huntington,
Attorney & Counsellor at Law,
Wilber National Bank Building,
Oneonta, New York.

Dear Sir:

Reference is made to your letter of February 29, 1928, relative to the claim for insurance benefits under policy K-812 772 of the wife of the above named insured.

War Risk term insurance in the amount of $10,000 was issued to the former service man upon an application of November 2, 1917. Premiums upon this insurance were paid to include the month of July, 1919. Insurance lapsed for non-payment of premium due August 1, 1919.

Under date of July 1, 1927, the former service man executed an application for the reinstatement of insurance and the conversion of same to a United States Government life insurance policy. This application for reinstatement of insurance, which was approved, was accompanied by a remittance of $13.90. $3.35 of this amount was necessarily applied

to cover the premium on $5,000 term insurance for
436 the month of August, 1919, during which month the insurance was protected by reason of the grace period. This left a balance of $10.55 to be applied as premiums upon the $5,000 converted policy. The monthly premium on this policy was $3.95 so that the amount of the original remittance was sufficient to pay premiums for the months of July and August, 1927, with an overpayment of $2.65. No further premium payments were made by the insured, according to the records of this office, until November 2, 1927. Therefore, the insurance lapsed for nonpayment of premium due September 1, 1927, the
437 grace period for the September premium having expired midnight, October 2, 1927.

Neither the September premium nor the October premium was paid and in fact, no further premium payments were made until that of November 2, 1927, and the only premium payment subsequent to that time was that of December 20, 1927.

The Bureau very much regrets the apparent impossibility of approving the claim for insurance benefits in this case and if you have any evidence to show that the former service man submitted any premium payments other than those which are cited above the Bureau will be very glad to again search the records
438 in this office.

"2"

Mahar, James P.—XC-707 911

Mr. Frank C. Huntington:

In this connection it is suggested that you obtain and forward to this office a certified copy of the pub-

lic record of the death of the insured in order that the file may be complete for further consideration. 439

In reference to the Adjusted compensation claim you are advised that the above named veteran designated his wife, Mrs. James P. Mahar, as the beneficiary of his Adjusted service certificate. Consequently there is enclosed herewith a special "demand for payment" form which should be executed by the above mentioned beneficiary in the presence of a United States postmaster, an executive officer of an incorporated bank or trust company or any person authorized to administer oaths in the community in which the form is executed, and returned to this office. The beneficiary's signature should appear on this form as "Mrs. James P. Mahar." 440

You are further advised that settlement will be made direct with the Wilber National Bank of Oneonta, New York, relative to the loan which they made to the veteran upon the pledge of his Adjusted Service Certificate, and the balance of such certificate will be paid direct to the beneficiary, Mrs. James P. Mahar. This Bureau will communicate direct with the above mentioned bank relative to reimbursing them for the loan which they made to the veteran.

For the director,
George E. Ijams,
Assistant Director. 441

DEFENDANT'S EXHIBIT 1

442 Form G. H. 117, July, 1927—Printed in U. S. A.

Metropolitan Life Insurance Company
(Incorporated by the State of New York)

SUPPLEMENTARY REPORT OF ATTENDING PHYSICIAN

Name of Patient, James Mahar.
Address, 4 East End Ave., Oneonta, N. Y.
Employed by D. & H. R. R. Co.

443 First treated on Oct. 19, 1927, by Doctor E. C. Winsor.

Are you treating patient now? Yes.

Is he physically unable to work at this time? Yes.

Is he confined to the house? No.

If, not why is he unable to work? Catharral jaundice.

Please give a clear and concise statement of his present physical condition and present cause of disability, Catharrhal jaundice with all accompanying general debility.

444 When do you think patient will be able to work? Cannot tell at this date.

Date, Nov. 14, 1927.

Signature, E. C. Winsor.

Stamped—Received Nov. 23, 9 A, Group Claim.

Form O34 Group, Jan., 1923—Printed in U. S. A.

Metropolitan Life Insurance Company

Claim Division—Ordinary Dept.—Group

1/3 8

W. W. Bates, M.

445

PROOF OF DEATH

STATEMENT OF EMPLOYER

City, Oneonta, N. Y.

Group Number 1433. Serial Number 22031. Date of Certificate, June 9, 1925. Amount of Insurance, $1800.00.

To the Metropolitan Life Insurance Company:

This is to certify that James P. Mahar (Name of Employee) died on the 24th day of Dec., 1927, and was in the employ of the undersigned at the date of death.

446

That the deceased had been so employed from Dec. 9th, 1924, to December 24th, 1927. And last reported for work on October 18th, 1927.

Name of beneficiary, Helen B. Mahar. Relationship, Wife. Age, 27. Residence: No. and Street, 4 East End Ave. City or town, Oneonta. State, N. Y.

Employer, D. & H. R. R. Co.

By S. Detmore (Official representative of employer).

447

Dated Dec. 26th, 1927.

Mr. W. W. Bates, Asst. to General Mgr.—P., D. & H. Co., Albany, N. Y.

Send claim check to—(cannot decipher).

## ATTENDING PHYSICIAN'S STATEMENT

448 As the company preserves a record of its mortality experience, the report of the attending physician will be of great service if precise and full answers are given to the following questions:

Full name of deceased: James P. Mahar.

Residence: No.: East End Ave. Street. City or town: Oneonta. State: N. Y.

Date of death: Dec. 24, 1927. Age at death: 37. White or colored: White.

Cause of death—Chief or primary: Chronic cholecyetitis and cholangitis. Contributing or secondary: Pulmonary embolism following operation.

449 How long had deceased been ill when you were called to attend? 11 weeks.

Date of first attendance in attendance in last illness: Dec. 21, 1927.

Date of last attendance in last illness: Dec. 24, 1927.

Was death the result of deceased's own hand or act? No.

I Hereby Certify that I attended the deceased from Dec. 21/27 to Dec. 24, 1927; that I signed the certificate on file at the office of the Board of Health or Register of Vital Statistics, and that the answers as

450 above recorded are complete and true to the best of my knowledge and belief.

Signature of physician, G. H. Brinkman.

Dated Dec. 26, 1927.

Residence: No. and Street, 3 Grand St. City or town, Oneonta. State, N. Y.

Note:—If no attending physician, or in case of

sudden death by accident or otherwise, attach certified copy of the record of death as shown by the books of the Health Department, Registrar, County Clerk or other officer having charge of such records. 451

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Form G. H. 24C. D. & H., June, 1926—Printed in U. S. A.—O. K.

Premiums must be regularly paid while drawing benefits

Metropolitan Life Insurance Company
(Incorporated by the State of New York)

Group Division

To be completed by the insured

After this form has been completed by you and by your attending physician please send to your employer. 452

Claim No. 72548

For Home Office Only

Serial 2031. Group 1GSWH
Date of cert., xxx. Age, 37. Sex, M.
First day out, 10-19-27. Benefit due 10-26-27.
Weekly benefit $15. First pay't made 11-10-27.
Amount $30. For 2 weeks.....days.
Date of last pay't 12-24-27. Total paid $128.57.
Covering 8 weeks 4 days.
Died. 453
Stamped—H. O. 1.
Full name, James P. Mahar.
Address, No. 4 East End Ave. Street. City, Oneonta. State, N. Y.
Employed by D. & H. R. R. Co. In the capacity of car inspector.

Insured under policy number (1433 crossed out) 1 G. S. H. Serial number 22031.

454 1. Age, 37. Single, married, Married. Color, White.

2. Are you unable to do any and every part of your work? Yes.

3. If able to perform some of your duties, what are they?.....

4. When were you first treated by a physician, Oct. 19, 1927.

5. Name and address of physician, Dr. Winsor, name. Schenevus Street, N. Y. City or state.

Stamped—Approved 11/8, 1927. W. W. Bates, Assistant to General Manager. M.

455 6. If disability was caused by accident, tell how accident happened..... Were you at work when accident happened..... Where and when did accident happen? Place..... Time ..... Date.....

7. Are you receiving benefits for this disability from any society, lodge or other organization? No.

8. If so, name organization and state how much and for how many weeks will benefit be paid?.....

9. When were you first unable to work? Oct. 19, 1927, at 3 o'clock P. M.

456 10. Where were you at that time? Home.

11. When do you expect to be able to perform your duties? About Nov. 10, 1927.

I affirm that the above statements are true and complete to the best of my knowledge.

James P. Mahar, Claimant.

Dated Oct. 26, 1927.

To Be Completed by the Attending Physician

Please complete statement below and on reverse side of this form furnish any additional information you deem advisable to report. 457

This is to certify that I first treated Mr. James P. Mahar at Schenevus, N. Y., on Oct. 19, 1927, at 1:00 o'clock P. M. for catarrhal jaundice (Please give full statement of cause for disability) complicated with .....that he (He or she) has since been continuously under my care, and that he( He or she) is totally (Totally or partially) unable to perform his (His or her) duties.

I expect that insured will be able to return to work on or about Nov. 9, 1927.

E. C. Winsor, M. D.,.....Address. 458

Dated.....19.....

O. K.—Stamp.

Stamped—Received Nov. 8, 12 M. Group Claim.

To Be Completed by the Employer

This is to certify Mr. James Mahar is employed by the undersigned as car inspector. That he (She deleted) has continuous service with this company since 12-9-1924. The last day worked was 10-18, 1927, and the first day absent was 10-19, 1927. Average earnings for the past four weeks $40.00 per week.

If disability is due to accident sustained in course of regular duties, give full particulars..... 459

Has accident been reported to the State Board or Commission acting under the State Workmen's Compensation Law?..... If so, when?.....

Has an award been made?..... How much

per week? $..... How many weeks?.....
460 Has employee returned to work? No. If so, exact date?..... Have you any reason to question the validity of this claim?..... If so, give particulars.....

W. R. Dunbar, D., Employer.

Date Oct. 27, 1927.

Stamped—Master car builder.

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Form G371, July, 1927—Printed in U. S. A.
12-10 117

Notice to medical examiner: This form to be used only by a Duly Appointed Medical Examiner of the company. In case the medical examiner is also the
461 attending physician, please refer to another duly appointed examiner for completion. Please Act Promptly.

MEDICAL EXAMINER'S REPORT—SICKNESS OR ACCIDENT

to the

Metropolitan Life Insurance Company

Group Division

Stamped—Doctor's fee allowed. Date 11-29-27. By A. H. T.

1. Name of insured, James P. Mahar—Serial No.
462 22031-1GSH.

2. Address, 4 East End Ave., Oneonta, N. Y.

3. Insured under Group Health and Accident Contract of Delaware & Hudson Co.

4. State where examination was made. At his home? His place of business? Your office? Or where? Patient's home.

5. State name and address of attending physician, Dr. E. C. Winser, Schenevus, N. Y.

463

6. Describe signs and symptoms as now found by you on personal examination, Marked jaundice.

7. If no evidence of injury or sickness exists, so state and give history from insured as to cause of disability for which this claim is being made.....

8. What is the exact nature of injury or disease responsible for this disability? (Give your own diagnosis), Catarrhal jaundice, catarrhal jaundice (obstructive).

9. How long will he be confined to house solely by this injury or sickness? From Oct. 19, 1927, to ?, 19.....

464

10. If not confined to house, how does he spend his time? Walks about for exercise.

11. How long will he be totally disabled from performing any and every kind of work in his occupation (your opinion)? From Oct. 19, 1927, to Dec. 15 (?), 1927.

12. If totally disabled but not confined to house, explain why he is unable to work, Lose strength, weak on exertion.

13. Is claimant, in your estimation, receiving proper and sufficient treatment to bring about earliest possible recovery? Would advise colonic injections, X-ray of gall bladder, etc., for definite diagnosis.

465

14. Is there any disposition to exaggerate or to remain away from work unnecessarily? No.

15. If, in your opinion, claimant is sufficiently recovered to return to work, please indicate to claimant

your views and protest against any further disability.....

466 Stamped—Received Nov. 29, ....., Group Claim.

Date examined, Nov. 26, 1927. Signed, LeRoy S. House, M.D. (Medical Examiner for Company).

Address, 27 Watkins Ave., Oneonta, N. Y.

Important — The Metropolitan Life Insurance Company desires that you inform the claimant you are making this examination at the request of the insurance company.

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DEFENDANT'S EXHIBIT 2

467 Stamped 0-0044

United States Veterans Bureau, Insurance Division
Form 742—Revised Dec., 1924

APPLICATION FOR REINSTATEMENT OF YEARLY RENEWABLE TERM INSURANCE

Stamped—K 812772

Applicant must fill out and sign the first page of application for reinstatement in every case. If insurance has lapsed for more than three months, including the grace month, the report of the medical examination on reverse side of this form is also re-

468 quired.

1. My name in full (First, middle, last name), James Patrick Mahar.

2. Certificate number, T-T366571.

3. My home address (Street and number, city, town, or post office, state), 4 East End Avenue, Oneonta, New York. Mailing address, 4 East End Avenue, Oneonta, New York.

4. I hereby apply for the reinstatement of $5,000 Term Insurance granted to me under the provisions of the War Risk Insurance Act, or the World War Veterans' Act, 1924, now lapsed on account of the nonpayment of the premium for the month of May, 1919, within the grace period of 31 days. As a condition to the reinstatement of this insurance, I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief, and are made as of the day on which the application is submitted to the Bureau or deposited in the United States mail. 469

5. Are you now in as good health as you were at the due date of the premium in default? Yes.

6. Are you now permanently and totally disabled? (Answer "Yes" or "No.") No. 470

7. Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? (Answer "Yes" or "No.") No. If so, give dates and full particulars, including the name and address of the physician .....

8. Have you ever made application for (a) Government compensation? No. For what disability? ..... (b) Training allowance? No. If so, give Claim No. C..... 471

9. I desire this reinstatement to be effective as indicated by check below: X—The first day of the month in which requirements have been complied with, or ☐—The first day of the following month.

Regulation 14 provides that Term insurance shall

be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or, upon his written request made during such month, from the first day of the following month.

10. Premiums Tendered With Application:

(a) For first month of lapse.....$ 6.70

(b) For month of July, '27, reinstatement of Term Insurance ..... 3.35

(c) Advance premium on Term Insurance $5,000 ..... 3.85

(d) For first payment on ($5,000 deleted) Government (converted) insurance..... ($3.85 deleted)

Total .....$13.90

Remitted by Check.

Use (b), (c), (d), as they may apply to your case.

Signed at Oneonta, New York, on this 1st day of July, 1927.

(Signature of applicant) James P. Mahar.

Witness: Donald H. Grant.

For Central Office Use Only

(Do not write in this space)

Received.....

Approved..... Date.....

Rejected..... Date.....

Insurance Medical Section:

Reinstated. Corrected Receipt Issued.

(Date) (Initials) (Date) (Initials)

Stamped—Acceptable under Regulation 14 and 15. By Dr. A. J. McIntyre, Ins. Medical Section. Date 8-9-27. Lay Exam. A. J. M.

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." 475

This application should be deposited in the United States mail immediately after execution.
c2-10201

(Reverse side)

Stamped—9 1213

MEDICAL EXAMINATION

(This examination is necessary only where insurance has lapsed for a period of more than three months.) 476

1. Applicant's Own Statement

1. Date of birth, Aug. 28, 1890.
2. Place of birth, Schoharie, New York.
3. Race, White.
4. Single, married, or widowed, Married.
5. Family record—

Father—Age if living, 69. Health good or bad (if not good, give full details), Good. Age at death, ..... Cause of death..... Year of death.....

Mother—Age if living..... Health good or bad ..... Age at death, 36. Cause of death, Childbirth. Year of death, 1897. 477

Sister—Age if living, 35. Health good or bad, Good. Age at death..... Cause of death..... Year of death.....

Sister—Age if living..... Health good or bad ..... Age at death, 3. Cause of death, Diphtheria. Year of death, 1888.

Brother—Age if living, 41. Health good or bad, Good. Age at death..... Cause of death.....

478 Brother—Age if living, 39. Health good or bad, Good. Age at death..... Cause of death.....

6. What operations have you had? Describe fully, giving dates, None.

7. Have you ever used wines or liquors to excess? No.

8. Have you ever used opium, morphine, cocaine, or other habit-forming drugs? No.

9. What is your occupation? Car inspector.

10. Are you now in good health? Yes.

11. Have you ever been treated for any disease of

479 brain or nerves, No. Throat or lungs, No. Heart or blood vessels, No. Stomach, liver, intestines, No. Kidney or bladder, No. Genito urinary organs, No. Skin, No. Glands, No. Ear or eye, No. Bones, No. (Answer each "Yes" or "No." If "Yes" describe fully and give dates.).....

Signed by applicant in the presence of medical examiner on this 1st day of July, 1927.

(Signature of applicant) James P. Mahar.

c2-10201

2. Medical Examiner's Report

(Examination not acceptable if made by a relative

480 of applicant.)

1. Height in shoes, 5 ft. 6 in.

2. Weight, coat and vest off, Est. 180 lbs. or weighing 189 lbs.

3. Girth of chest, normal, 40 in. Forced expiration, 39 in.; forced inspiration, 43 in.

4. Girth of abdomen, 35 in.

5. State pulse rate: (a) Before exercise, 70. (b) Immediately after, 76. (c) One minute after, 76. (d) Two minutes after, 70.

481

6. Blood pressure (See Note): Systolic, 120. Diastolic, 65. Instrument used, Bannonometer.

7. After examination do you find any abnormality of the heart? No. Is it irregular? No. Does it intermit? No. Is there a murmur? No. (If any heart disability is found or suspected, complete Special Heart Examination on reverse side.)

8. Has applicant's weight increased recently? No. Diminished? No. If so, state cause, how much, and within what period.....

9. After examination, do you find any abnormality of the lungs? No. (Afternoon temperature is required in slender person with suspected tuberculosis tendency or with suspicious signs.) Obtain a careful history of every so-called pleurisy case with special reference to duration, effusion, and what disease is followed. Record the facts here. If tuberculosis is found or suspected, complete the Special Tuberculosis Examination on reverse side.....

482

10. After an examination do you find any abnormality of the nervous system? No. Skin? No. Ear? No. Eye? No. Abdomen? No. Or digestive system? No. (Answer each "Yes" or "No." If "Yes" describe fully.).....

488

11. Urinalysis: Specific gravity, 1020. Albumin, No. Casts, No. Reaction, Acid. Sugar, No. Test used, Haines. Have you knowledge that the urine examined was passed by the applicant at the time of examination? Yes.

12. Has applicant ever had syphilis, gout, or rheumatism? No.

484

13. Any defects in the sight or hearing? No.

14. Any deformity or departure from normal in any respect? No.

15. Has the applicant lost an eye, hand or arm, foot or leg? No.

16. Is the ability to work impaired in any way? If so state particulars, No.

17. Is the applicant ruptured? No. Is it reducible?..... Is a suitable truss worn?.....

18. How long have you known applicant? 1st meeting. By what means are you satisfied as to the identity of the person examined?..... Give some mark of identification, Birthmark back, lumbar region.

485

19. Are you related to applicant? No.

20. Was this examination made at your home or office, or at applicant's home? State place and address, Office.

21. Do you recommend acceptance of the risk? Yes. 1st Class Risk, √. Fair Risk..... Poor Risk.....

22. Are answers to questions of medical examination in your own handwriting? Yes.

23. Females: Any history of uterine or ovarian diseases?..... Married: If pregnant, month advanced..... Date of last confinement? Was it normal?..... Number of miscarriages, if any, and dates.....

486

24. Are you satisfied that everything has been fully stated regarding the physical condition, habits, personal and family history of the applicant? Yes.

Examination of James P. Mahar made and signed this 1 day of July, 1927, New York (Name of State in which you are licensed to practice medicine). 487

George W. Augustine (Signature—Official designation).

Oneonta, New York.

Notes.—Blood pressure is required (a) when applicant is more than thirty years of age, (b) in all cases where there is a family history of apoplexy, heart disease, or nephritis; or where there is a personal history of gout, rheumatism, syphilis, heart disease, or any evidence of kidney disease.

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." 488

c2-10201

(Reverse side)

Stamped—9 1213

Stamped—Mail Sub-Div., M. & R. Div., U. S. V. B., 12.30 o'clock, July 2, 1927, R. No. 4.

SPECIAL TUBERCULOSIS REPORT

Temperature..... Pulse..... Time of examination..... Height .....in. Weight (without coat).....pounds. Did you weigh the man yourself?..... Normal (Man's statement) ..... Highest (Within 1 year, date)..... pounds. Lowest (Within 1 year, date)..... pounds. Sputum (positive or negative)..... If positive, how many specimens were examined? ..... 489

Examination of Chest

490 Shape..... Mobility.....

Palpitation—Fremitus.....

Percussion—R. lung..... L. lung.....

Auscultation—R. lung..... L. lung.....

(No examination is acceptable without auscultation during normal inspiration, following expiratory cough.)

Summary—Indicate areas of infiltration, consolidation, etc., lobe by lobe..... Indicate location and size of cavities, if present..... Is applicant bedridden?..... If so, since what date?..... Are any other parts of body involved besides the lungs?.....

491 Diagnosis—Condition—Active, quiescent, apparently arrested, or arrested. (Underscore the condition found.) Stage — Incipient, moderately advanced, or far advanced. (Underscore the stage found.)

How long has applicant been ill with tuberculosis? .....

Is applicant permanently totally disabled?.....

SPECIAL REPORT OF HEART AND BLOOD VESSELS

492 If a murmur is found state location and time..... Where transmitted?..... Functional or organic..... Probable cause..... Any history of rheumatism or infectious disease..... Any enlargement, dilatation, or hypertrophy..... Measurements..... Probable cause of enlargement..... Dyspnœa..... How severe..... Edema of extremities or lungs

..... Cyanosis..... Condition of arteries..... If bradycardia or tachycardia exists give cause..... Is there any evidence of kidney disturbance.....

Examination made and signed this.....day of....., 192

.....(State in which licensed to practice medicine.)

.....(Signature). (Official designation.)

(Address.)

c2-10201—Government Printing Office.

493

## DEFENDANT'S EXHIBIT 3

494

Treasury Department, Bureau of War Risk Insurance—Form 1111

8N—Unit No. 9-1213

### RECEIVING TELLER'S REGISTER OF INSURANCE PREMIUM RECEIPTS ISSUED

August 5, 1927 (Date). K. Applications. N. (Teller).

c2-8508

Name of Insured or Certificate No.—Twist, Ernest S., T-89207. Amount, 19.45—3.75 P. H. mac 4969.

Name of Insured or Certificate No.—Montgomery, Jean P., T-173890. Amount, 7.00—3.55 T. mac 5311.

495

Name of Insured or Certificate No.—Krumpeck, Fred R., T-265904. Amount, 40.60—.65 F mac 5470.

Name of Insured or Certificate No.—Banks, Vere J., T-272887. Amount, 20.63—.67 P. mac 5377.

Name of Insured or Certificate No.—Mahar, James P., T-366571. Amount, 13.90—3.35 F. mac. 5302.

* * *

(Follows further list of names.)

## REMITTANCE LISTING SHEET

496 Stamped—7 2909

United States Veterans Bureau, Insurance Division Form 830

Stamped—Received Jan. 7, 1928, K-Section 5. Cashier's Repres.

| Certificate Number | Amount |
|---|---|
| 8,122.24 | 1.74 |
| 23.99 | 10.12 |
| 26.81 | 17.20 |
| 27.72 | 3.95 |

* * *

(Follows further list of accounts.)

497

## REMITTANCE LISTING SHEET

49

United States Veterans Bureau, Insurance Division Form 830

Stamped—6 5022

| Certificate Number | Amount |
|---|---|
| 8,081.83 | 18.10* |
| 92.93 | 7.80 |
| 84.74 | 3.75 |
| 83.56 | 52.80 |
| 88.42 | 18.10 |
| 498 88.47 | 3.65 |
| 93.53 | 20.60—Rfd. 2551 12-8-28 P |
| 93.56 | 2.16 |
| 95.78 | 9.76 |
| 97.22 | 7.30 |

| | | |
|---|---|---|
| 97.26 | | 5.20 |
| 97.74 | 8-3-28 | 3.55—3.40 H Rfd. 93398 |
| 99.41 | 3-23-28 E | 14.55—Pfd. 85019 |
| 8,100.32 | | 13.45 |
| 56 | | 7.40 |
| 98 | | 8.40 |
| 1.31 | | 4.10 |
| 1.93 | | 3.65 |
| 4.48 | | 10.90 |
| 2.01 | | 7.00 |
| 2.42 | | 4.38 |
| 2.51 | | 4.74 |
| 2.57 | | 10.08 |
| 7.40 | 1-23-28 H. | 1.50—Rfd. 78318 |
| 7.43 | | 4.12 |
| | | 247.04S |

| Certificate Number | Amount |
|---|---|
| 8,107.50 | 6.76 |
| 7.72 | 6.80 |
| 8.30 | 7.75 |
| 9.10 | 12.12 |
| 9.65 | 2.43 |
| 10.19 | 2.67 |
| 14.61 | 4.20 |
| 15.21 | 6.90 |
| 16.73 | 5.00 |
| 17.05 | 7.10 |
| 20.60 | 2.38 |
| 21.19 | 5.23 |
| 21.48 | 13.48 |
| 22.31 | 3.75 |
| 23.21 | 3.76 |

502

| | | |
|---|---|---|
| 14.78 | 7.10 | |
| 14.41 | 4.34 | |
| 24.88 | 1.88 | |
| 25.48 | 3.60 | —Rfd. 5917 1-16-29 E |
| 26.76 | 5.28 | —Short 11-29-27 B |
| 27.72 | 3.95 | |
| 28.49 | 8.49 | |
| 29.07 | 12.50 | |
| 29.16 | 23.90 | |
| | 408.41* | |

Stamped—Nov. 18, 1927.

503

63#

2-10098 Sep. 52—N. OP.—M. OP.—CK. 58

Stamped—6 5022 4

CASHIER'S REPRESENTATIVE'S RECORD

Unit List No..... Received.....A. M.

.....P. M....., 192

Del'd to Head Cashier's Rep.....A. M.

.....P. M....., 192

Number of Pieces of Correspondence.....

Notices Rejected.....

Government Printing Office—2-10098

504

No. K 812772

C 707911 XC#707911

Name, Mahar, James Patrick

Address, 4 East End Ave., Oneonta, N. Y.—8

Premium, 8.95. Mode, M. Amount, 5000. Plan, 5 Ct. Effective Date, 1927 July 1. Birth Date, 1890/8/28. Age, 37. Original Certificate No.,

366571. Amount of Other Ins..... Number.....

Year 1926—Jan..... Feb..... Mar..... 505
Apr..... May..... June..... July.....
Aug..... Sept. 772 sent 1-9-28. Oct..... Nov.
..... Dec..... Dividend.....

Year 1927—Jan..... Feb..... Mar.....
Apr..... May..... June X July 7-1 1055 9-1213
Aug. 9-12-13 Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1928—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1929—Jan..... Feb..... Mar..... 506
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1930—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1931—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug. Died 12/24/27 Sept..... Oct..... Nov.
..... Dec..... Dividend.....

Year 1932—Jan..... Feb..... Mar..... 507
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1933—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....

Dec..... Dividend.....

508 Year 1934—Jan..... Feb..... Mar.....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Year 1935—Jan..... Feb..... Mar .....
Apr..... May..... June..... July.....
Aug..... Sept..... Oct..... Nov.....
Dec..... Dividend.....

Suspense Remittances—

Date, 7-1. Unit No., 91213. Amt. (10.55 deleted); (13.90 deleted). Over, 2.65. Short.....
Disposition, (3.35 deleted) Mac 5302.

509 Date, 11-2. Unit No., 6-5022. Amt., 3.95. Over ..... Short..... Disposition.....

Date, 12-20. Unit No. 7-2909. Amt., 3.95. Over ..... Short..... Disposition.....
—Letter 1/21/30.

United States Veterans Bureau—Insurance Division —Premium Record Card—Form 794—(Rev. Jan., 1922).

2-10067—U. S. Government Printing Office: 1927

Allotment effective..... Allotment discontinued..... Date of discharge.....

Name of Beneficiary, Estate No. bene. desig. Relationship..... Share.....

510 Surrendered..... Option..... Amt. or Period..... Date.....

Loans..... Number..... Amount ..... Maturity..... Paid.....

Dividend Deposits—Date..... Amount ..... Withdrawn.....

Changes—Nature..... Date.....
Number.....
Claims—Death..... Disability.....
Miscellaneous Receipts—Nature..... Date
..... Unit No..... Amount.....
Remarks.....
Stamped—Received Premium (cannot decipher), Jan. 27, 1928, Computing Section, Awards Division.

511

1917, Nov.
Plate made C-707-911
Mahar, James Patrick S N 1201260, Name
366571, Policy No.
A 102 Engrs., Organization. Pvt., Rank
(Cherry Valley, deleted) Seward, Scho. Co., N. Y.,
Home Address. 27, Age nearest birthday
10000, Amount of insurance. 33, Mode term. .....
Cause of Death—Disability
(E) 11-2-17—R NF—(D) 4-3-19 95-A
2-3951

512

513

| | Month | Amount Due | Amount Collected | Month | Amount Due | Amount Collected |
|---|---|---|---|---|---|---|
| 514 | 1917 | | | Nov. | ..... | ..... |
| | Oct. | ..... | ..... | Dec. | ..... | ..... |
| | Nov. | 6.70 | ..... | 1920 | | |
| | Dec. | ..... | ..... | Jan. | ..... | ..... |
| | 1918 | | | Feb. | ..... | ..... |
| | Jan. | ..... | ..... | Mar. | ..... | ..... |
| | Feb. | ..... | ..... | Apr. | ..... | ..... |
| | Mar. | ..... | ..... | May | ..... | ..... |
| | Apr. | ..... | ..... | June | Died 12/24/27 | |
| | May | ..... | ..... | July | ..... | ..... |
| | June | ..... | ..... | Aug. | ..... | ..... |
| | July | ..... | ..... | Sept. | ..... | ..... |
| 515 | Aug. | ..... | ..... | Oct. | ..... | ..... |
| | Sept. | ..... | ..... | Nov. | ..... | ..... |
| | Oct. | ..... | ..... | Dec. | ..... | ..... |
| | Nov. | ..... | ..... | 1921 | | |
| | Dec. | ..... | ..... | Jan. | ..... | ..... |
| | 1919 | | | Feb. | ..... | ..... |
| | Jan. | ..... | ..... | Mar. | ..... | ..... |
| | Feb. | ..... | ..... | Apr. | ..... | ..... |
| | Mar. | ..... | ..... | May | ..... | ..... |
| | Apr. | ..... | * | June | ..... | ..... |
| | May | ..... | 4-15 | July | ..... | ..... |
| | | | 13.40 | Aug. | ..... | ..... |
| 516 | June | ..... | June 10 | Sept. | ..... | ..... |
| | | A 10c | | Oct. | ..... | ..... |
| | July | e80 | June 10 | Nov. | ..... | ..... |
| | | | Mac 5302 | Dec. | ..... | ..... |
| | Aug. | A 30c | 3.35 | 1922 | | |
| | Sept. | ..... | ..... | Jan. | ..... | ..... |
| | Oct. | ..... | ..... | Feb. | ..... | ..... |

| Month | Amount Due | Amount Collected | Month | Amount Due | Amount Collected |
|---|---|---|---|---|---|
| Mar. | ..... | ..... | July | Conv. 5000 | |
| Apr. | ..... | ..... | 1927 | | |
| May | ..... | ..... | Aug. | ..... | ..... |
| June | ..... | ..... | Sept. | ..... | ..... |

517

Record of Premiums Paid, Treasury Department, Bureau of War Risk Insurance, Division of Military and Naval Insurance—Form 23.

Stamped — Received, Premium Rec. (cannot decipher), Jan. 27, 1928, Computing Section, Awards Division.

518

519

ORDER

520

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant.*

521

LAW No. 1389

On reading the affidavit of B. Fitch Tompkins, Assistant United States Attorney, and consent of the appellee and for good cause shown, it is

Ordered, that the appellant's time to docket the case, print and file the record thereof in the Second Circuit Court of Appeals is hereby enlarged and extended to November 1st, 1933.

Dated, September 15th, 1933.

522

FRANK COOPER,
United States District Judge,
Northern District of New York.

Timely notice admitted and consent to entry given.
FRANK C. HUNTINGTON,
Attorney for Plaintiff.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

523

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,

*Plaintiff,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant.*

LAW No. 1389

STATE OF NEW YORK,
County of Onondaga,
City of Syracuse. } ss.

524

B. Fitch Tompkins, being duly sworn, deposes and says, he is an Assistant United States Attorney for the Northern Judicial District of New York, having in charge the prosecution of the appeal in this above mentioned case.

That the order allowing appeal with other papers herein was signed August 17th and entered August 21st, 1933, and citation issued returnable in thirty days. That deponent finds that numerous exhibits were used on the trial and were returned to the respective parties, that the Government exhibits were returned to the Veterans' Administration file which was in Washington pending decision as to appeal; that it will be impossible to collect these exhibits in time for printing the record in the case within the thirty day period specified in the citation.

525

Deponent asks that an order be made enlarging

the time to docket the case and print and file the record thereof to the 1st day of November, 1933.

526

B. F. TOMPKINS.

Subscribed and sworn to before me this 12th day of September, 1933.

OLIVER D. BURDEN,
Notary Public.

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Similar order extending time to November 30th entered October 31st, 1933.

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527 Similar order extending time to December 20th dated November 29th and signed by Judge Frederick H. Bryant.

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## STIPULATION RE CERTIFICATION

It is hereby stipulated that the foregoing printed copy is a true transcript of the record on appeal as agreed to by the parties.

Dated, December 8 ~~th~~, 1933.

FRANK C. HUNTINGTON,
Attorney for Appellee.

528 OLIVER D. BURDEN,
United States Attorney,
Attorney for Appellant.

Upon the foregoing stipulation and the foregoing printed Bill of Exceptions and Transcript of Record, containing all the evidence, exhibits and proceedings had upon trial of this action, as agreed upon by the parties hereto, the same is hereby settled and ordered filed with the Clerk of the United States District Court for the Northern District of New York and in lieu of the original papers for the purpose of certifying the record on appeal. 529

Dated, Syracuse, N. Y., December 12., 1933.

FREDERICK H. BRYANT,
U. S. District Judge.

530

CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of JAMES PATRICK MAHAR, Deceased,
*Plaintiff*,

vs.

THE UNITED STATES OF AMERICA,
*Defendant.* 531

LAW No. 1389

UNITED STATES OF AMERICA,
Northern District of New York } ss.

I, John W. Hahn, Clerk of U. S. District Court for

the Northern District of New York, do hereby certify that the foregoing and annexed printed copy
532 has been presented to me with a stipulation by the attorneys for the parties, that such printed copy is a true transcript of the record on appeal herein as agreed to by the parties, and I do hereby certify the same to be the transcript of record on appeal herein.

In Testimony Whereof I have hereunto set my hand and caused the seal of the District Court of the United States for the Northern District of New York to be hereunto affixed at the City of Utica in said District on this 12 day of December, 1933.

538 JOHN W. HAHN,
Clerk.

(Seal of the Court)

534

[fol. 179] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 315

Argued February 9, 1934. Decided March 5, 1934

THE WILBER NATIONAL BANK OF ONEONTA, N. Y., as Administrator of the Estate of James Patrick Mahar, Deceased, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant

Appeal from the District Court of the United States for the Northern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Suit by the Wilber National Bank of Oneonta, N. Y., as administrator of the estate of James Patrick Mahar, deceased, against the United States on a policy of insurance. Judgment for plaintiff; defendant appeals. Reversed.

Oliver D. Burden, U. S. Atty., of Syracuse, N. Y., Will G. Beardslee, Director, Bureau of War Risk Insurance, of Washington, D. C., and Wilbur C. Pickett, Sp. Asst. to Atty. Gen., for the United States.

Frank C. Huntington, of Oneonta, N. Y. (Sterling P. Harrington, of Oneonta, N. Y., of counsel), for appellee.

MANTON, Circuit Judge:

The appellee brought this action, as administrator of the estate of the deceased, to recover upon a contract of the United States government life insurance issued effective July 1, 1927. The deceased was a World War veteran and held a war risk term insurance policy for $10,000, which lapsed August 31, 1919, through failure to pay the premium on August 1, 1919. In June, 1927, he applied for reinstatement of $5,000 of this insurance to be effective July 1, 1927. The requirements of reinstatement were payment of premiums on the $5,000 policy he desired rein-

stated for the lapsed month of August, 1919, which was $3.35, and one month's premium on the converted policy, $3.95.

About July 1, 1927, the insured remitted his check for $13.90 to pay for the lapsed month and for the months of July and August, 1927, and left a credit of $2.65 to be applied on account of $3.95 to become due September 1. The United States issued a receipt, dated July 29, 1927, for the remittance which contained the following clause:

"Important.—Insurance under the application evidenced by the above remittance shall be effective subject to the World War Veterans' Act, 1924 and Regulations, i. e., provided that previous term insurance be in force, or if lapsed, reinstatement thereof be approved by the Bureau; or if there be no previous term insuranec that the applicant be entitled to Government Life Insurance; and that proper amount be tendered to cover the premium and that application be acceptable to the Bureau; otherwise the remittance will be returned to the depositor."

The policy was issued September 9, 1927, and received by the insured shortly thereafter. The insured was not advised as to how his remittance of $13.90 had been applied. On November 2 and December 20 remittances of $3.95 were sent and no acknowledgment or receipt was made until after the death of the insured. In September the insured became ill, and on October 17, 1927, he became incapacitated and died December 24, 1927. After his death an undated receipt for the $3.95 with the words, "tendered in payment of the premium due September 1, 1927," was received.

[fol. 180] The appellee claimed the insurance. The claim was refused on the ground that the insurance had lapsed for nonpayment of premium due September 1, 1927. The grace period for September lapsed October 2, 1927.

Veterans' Bureau Regulation 14, subd. 2, declares the premium due on the 1st day of the month; if not paid when due, the insurance shall lapse as of that date, except that section 14, subd. 3, provides that the premium may be paid thereafter at any time within 31 days, exclusive of the due date, which shall constitute a grace period for the payment of such premium. During such grace period the insurance shall remain in force.

The court below held that the government was estopped from denying that the policy was not in effect on the date of the insured's death, by its conduct, and therefore granted a recovery. It is the appellee's contention that the United States government is bound by the act of its agents in the same manner as any other insurer, and that by electing to receive the premium for September it waived any right it might have had to insist upon a cancellation of the policy for failure to pay the premium due on September 1st; that it thereby made the policy in full force during September and October.

The conditions of the policy relating to premium payments were not met by a payment of the premium due September 1, 1927, and the insurance policy therefore expired counting in the grace period on October 2, 1927, unless there was a waiver by the appellee. The claim that there was such a waiver cannot be sustained. Crawford v. United States, 40 F. (2d) 199 (C. C. A. 2).

In Raives v. Raives 54 F. (2d) 267 (C. C. A. 2), the policy provided for incontestability after six months except for nonpayment of premiums, but, because the policy did not give the government the right it had by statute—contestability for fraud—this court declared the policy not binding on the government when fraud had been practiced. The United States is bound by its agents only to the extent that it consents to be so obligated. In Birmingham v. United States, 4 F. (2d) 508 (C. C. A. 8), it was held that the government cannot be bound by waiver of any of the provisions of the policy by the acts of its agents. The government is not to be regarded as an ordinary insurance company. An agent of the United States has no power to place liability upon it by an act of omission which he could not do by commission. This is so firmly settled as to forbid holding that, when the government entered a new field, it broadened the powers of employees to bind the government where they had no such power in other fields. Therefore there was no estoppel, and the policy lapsed by nonpayment. U. S. v. Loveland, 25 F. (2d) 447 (C. C. A. 3).

In Standard Oil Co. of N. J. v. United States, 267 U. S. 76, 45 S. Ct. 211, 69 L. Ed. 519, the court held that the United States was liable for the loss of the vessel, since the government had insured against war risk. In deter-

mining whether the United States was also liable for interest, Justice Holmes declared that, when the United States went into the insurance business, issued policies in familiar form, it must be assumed to have accepted the ordinary incidents of suits in such business. But in the subsequent case of White v. United States, 270 U. S. 175, 46 S. Ct. 274, 275, 70 L. Ed. 530, Justice Holmes pointed out the nature of the relationship between the government and its soldiers in war risk policies, and recognized that insurance for soldiers was based upon a different relationship. It was not regarded as one of "familiar form." He said: "The insurance was a contract, to be sure, * * * but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. * * * It was a new experiment. * * *"

Whatever may be the equities in favor of the appellee, and much may be said in its favor, it is clearly established we think that there can be no waiver here by the conduct of the appellant. The law does not permit waiving statutory requirements by the acts of employees of the government. The failure to pay the premiums prior to October 2 resulted in a lapse of the policy which may not now be held to be waived by the conduct of the government's employees.

Judgment reversed.

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[fol. 181] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the courtrooms in the Post Office building in the City of New York, on the 12th day of March, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

WILBUR NATIONAL BANK OF ONEONTA, N. Y., as Administrator, etc., Plaintiff-Appellee,

vs.

UNITED STATES, Defendant-Appellant

Appeal from the District Court of the United States for the Northern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 182] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Wilber National Bank of Oneonta, N. Y., vs. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 12, 1934. William Parkin, Clerk.

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[fol. 183] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 182, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Wilber National Bank of Oneonta, N. Y., as Administrator, etc., Plaintiff-Appellee, against United States, Defendant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of June, in the year of our Lord one thousand

nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

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[fol. 184] IN THE SUPREME COURT OF THE UNITED STATES

WILBER NATIONAL BANK OF ONEONTA, NEW YORK, Administrator of the Estate of James Patrick Mahar, Deceased, Petitioner,

v.

THE UNITED STATES OF AMERICA

October Term, 1933

ORDER EXTENDING THE TIME FOR DOCKETING THIS CAUSE

Upon consideration of the request of petitioner herein it is this, the 2nd day of June, 1934,

Ordered, That the time for docketing this cause, filing the record, and filing the petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, and supporting brief, be, and the same hereby is extended for a period of 60 days from June 2, 1934.

HARLAN F. STONE,
*Associate Justice.*

[fol. 185] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed, in response to such writ.